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1944

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A. I. R. (30) 1943 Calcutta = Other Journals

AIR 1943 Calcutta				AIR 1943 Calcutta				AIR 1943 Calcutta				AIR 1943 Calcutta			
AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
240	77	C L J	399	442	ILR 1943-2 C	546	539	ILR 1944-1 C	410	624	77	C L J	481		
		ILR 1943-2 C	313	470	77	C L J	474	544	ILR 1943-2 C	245		ILR 1944-1 C	317		
247		ILR 1943-2 C	272		ILR 1943-2 C	462	555	ILR 1943-2 C	397	629		ILR 1944-1 C	169		
255		ILR 1943-2 C	431	479	ILR 1944-1 C	233	560	ILR 1944-1 C	286	640		ILR 1943-2 C	407		
257		ILR 1943-2 C	227	484	ILR 1943-2 C	298	574	ILR 1944-1 C	192	643	45	Cr L J	307		
34	FB	ILR 1943-2 C	581	489	SB	78 C L J	281	588	77	C L J	483	644	45	Cr L J	258
372		ILR 1943-2 C	417	527	ILR 1944-1 C	113	590	77	C L J	426		77	C L J	407	
417		ILR 1943-2 C	605				613	ILR 1944-1 C	139		48	C W N	356		

A. I. R. (31) 1944 Calcutta = Other Journals

AIR 1944 Calcutta				AIR 1944 Calcutta				AIR 1944 Calcutta				AIR 1944 Calcutta				
AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			
1	211	I C	450	82	48	C W N	85	159	48	C W N	170	241	47	C W N	359	
	ILR 1944-1 C	101			211	I C	440		213	I C	28		ILR 1943-1 C	392		
4	77	C L J	93	84	48	C W N	76		ILR 1944-1 C	675		215	I C	124		
	212	I C	421		211	I C	503	160	48	C W N	271	243	ILR 1944-1 C	133		
13	77	C L J	137		77	C L J	442		212	I C	600		215	I C	153	
	211	I C	33	88	47	C W N	239		45	Cr L J	646		46	Cr L J	28	
14	77	C L J	134		ILR 1943-1 C	357		161	ILR 1944-1 C	438	245	47	C W N	384		
	211	I C	428		212	I C	72		48	C W N	151		ILR 1943-2 C	186		
17	48	C W N	113	89	212	I C	317		214	I C	272		215	I C	33	
FB	211	I C	177	92	ILR 1943-1 C	493		162	48	C W N	266	247	ILR 1943-1 C	69		
	45	Cr L J	309		211	I C	574		213	I C	228	249	216	I C	129	
39	211	I C	624		45	Cr L J	431	163	48	C W N	225	253	48	C W N	269	
	45	Cr L J	468	106	ILR 1943-1 C	578			78	C L J	48	255	ILR 1943-2 C	280		
40	77	C L J	159		212	I C	483		ILR 1944-1 C	329		216	I C	57		
	211	I C	470	110	ILR 1943-1 C	408			216	I C	143	260	48	C W N	309	
42	77	C L J	155		212	I C	120	189	214	I C	154	263	ILR 1943-1 C	244		
	211	I C	388	111	ILR 1943-1 C	453			ILR 1944-1 C	445		216	I C	229		
44	77	C L J	186		212	I C	389	193	48	C W N	361	265	48	C W N	191	
	211	I C	348	112	47	C W N	533	FB	213	I C	273		ILR 1944-1 C	566		
	ILR 1944-1 C	11			77	C L J	191	196	48	C W N	403	272	48	C W N	454	
46	47	C W N	374		213	I C	352	SB	213	I C	171		79	C L J	59	
	207	I C	277	113	47	C W N	578	198	SB	213	I C	84	282	216	I C	239
	ILR 1943-1 C	589			77	C L J	180	199	48	C W N	210	283	48	C W N	469	
	77	C L J	385		ILR 1943-2 C	471			214	I C	114		214	I C	229	
50	ILR 1943-1 C	397		116	212	I C	582		ILR 1944-1 C	297		284	45	Cr L J	748	
	211	I C	270		212	I C	606						214	I C	219	
53	77	C L J	224		1943-11 I T R	504	203	77	C L J	506			45	Cr L J	745	
	211	I C	515	118	47	C W N	362		48	C W N	220	287	48	C W N	420	
57	77	C L J	194		ILR 1943-1 C	430			216	I C	292		217	I C	16	
	211	I C	460		212	I C	123	206	48	C W N	157	288	47	C W N	894	
	48	C W N	505	120	ILR 1943-1 C	540			214	I C	160		77	C L J	323	
	ILR 1944-1 C	203			212	I C	102						ILR 1944-1 C	321		
63	47	C W N	458		45	Cr L J	517	211	48	C W N	172	289	48	C W N	348	
	77	C L J	63	121	212	I C	104		215	I C	201	297	77	C L J	451	
	211	I C	289		45	Cr L J	520	219	48	C W N	312	299	48	C W N	465	
64	48	C W N	12	125	212	I C	230		214	I C	179	301(1)	48	C W N	535	
	211	I C	310		1943-11 I T R	499	224	213	I C	401		301(2)	48	C W N	172	
	ILR 1944-1 C	588	127	ILR 1943-1 C	156			45	Cr L J	666		302(1)	48	C W N	317	
67	47	C W N	387		213	I C	63		ILR 1944-1 C	398		302(2)	48	C W N	470	
	77	C L J	53	132	77	C L J	209	228	77	C L J	422	303	48	C W N	496	
	211	I C	356		212	I C	222		214	I C	19	304	ILR 1943-2 C	392		
	ILR 1943-2 C	348	135	214	I C	108	230	48	C W N	347		305	48	C W N	571	
72	48	C W N	48	138	48	C W N	203		214	I C	90	306	77	C L J	414	
	211	I C	445		78	C L J	270	231	48	C W N	359		48	C W N	547	
	ILR 1944-1 C	690			214	I C	262		213	I C	381	308	1944-12 I T R	68		
73	48	C W N	81	143	ILR 1943-1 C	15	232	47	C W N	725	309	48	C W N	501		
	211	I C	529		212	I C	492		77	C L J	338	310	48	C W N	321	
76	211	I C	373	145	209	I C	569		ILR 1944-1 C	312	315	48	C W N	537		
	45	Cr L J	380		47	C W N	544	234	77	C L J	415	317	...			
79	48	C W N	138	153	ILR 1943-2 C	192			ILR 1943-1 C	181	318	48	C W N	504		
	211	I C	392		212	I C	567		215	I C	176		ILR 1944-1 C	441		
	45	Cr L J	384	157	76	C L J	363		46	Cr L J	31	319(1)	47	C W N	464	
	ILR 1944-1 C	456			213	I C	234	240	48	C W N	344		ILR 1943-2 C	360		

A. I. R. (31) 1944 Calcutta = Other Journals (concl'd.)

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AIR 1944 Calcutta				AIR 1944 Calcutta				AIR 1944 Calcutta				AIR 1944 Calcutta			
AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
319(2)	47	C W N	507	339	48	C W N	366	382 con	215	I C	132	411	48	C W N	580
		ILR 1943-2 C	322		215	I C	67		46	Cr L J	17	414	48	C W N	637
320	48	C W N	625		45	Cr L J	771	383	48	C W N	484		ILR 1943-2 C	576	
321	48	C W N	603	364	ILR 1943-2 C	443			79	C L J	45	416	48	C W N	500
322	47	C W N	466	370	48	C W N	714	384	ILR 1944-1 C	28		417	48	C W N	550
		ILR 1943-2 C	364	374	48	C W N	632	385	48	C W N	751	418	48	C W N	835
323	ILR 1943-2 C	381			215	I C	298	388	ILR 1944-1 C	109	SB	78	C L J	343	
325	48	C W N	551		46	Cr L J	94		216	I C	243	421	48	C W N	759
326	48	C W N	593	376	48	C W N	604	389	ILR 1943-2 C	436		426	48	C W N	833
328(1)	77	C L J	395	377	ILR 1944-1 C	199			216	I C	48	SB	79	C L J	1
328(2)	77	C L J	434		215	I C	212	391	48	C W N	755	428	48	C W N	472
330	77	C L J	461		46	Cr L J	70	395	48	C W N	655	432	216	I C	76
334	ILR 1943-2 C	373	378	48	C W N	718	401	48	C W N	699	433	ILR 1943-2 C	554		
335	47	C W N	441	381	48	C W N	542	407	48	C W N	574	445	48	C W N	685
		ILR 1943-2 C	325	382	ILR 1944-1 C	31			215	I C	312	448	216	I C	321

CASES OVERRULED & REVERSED

IN

A. I. R. (31) 1944 CALCUTTA

- | | |
|--|---|
| Bank of Baroda, Ltd. v. Punjab National Bank,
(42) 46 C. W. N. 645 = 29 A. I. R. 1942 Cal.
562=203 I. C. 207 | Reversed in A. I. R. (31) 1944 P. C. 58. |
| Bhabani Prosad Maitra v. Satyendra Nath Mukherjee,
(43) 77 C. L. J. 373 = 47 C. W. N. 524 = 30
A. I. R. 1943 Cal. 372=209 I. C. 34 | OVERRULED in A. I. R. (31) 1944 Cal. 193 (F. B.). |
| Bhugwat Sahay v. Pashupati Nath Bose, ('06) 10
C. W. N. 564 | Impliedly Overruled in A. I. R. (31) 1944 P. C. 65. |
| Naresh Chandra Gupta v. Lal Mamud Bhuiya, ('42)
I. L. R. (1942) 2 Cal. 243=76 C. L. J. 41=46
C. W. N. 457=29 A. I. R. 1942 Cal. 379=202
I. C. 343 | OVERRULED in A. I. R. (31) 1944 Cal. 193 (F. B.). |
-

THE ALL INDIA REPORTER

1944

Calcutta High Court



*** A. I. R. (31) 1944 Calcutta 1**

McNAIR J.

Smt. Brindarani Debi — Plaintiff
v.

Co-operative Assurance Co. Ltd. —
Defendant.

Suit No. 322 of 1942, Decided on 9th April 1943.

(a) Civil P. C. (1908), S. 20—Insurance company — Head Office at Lahore — Branch office at Calcutta—Company held carried on business in Calcutta.

An insurance company had its head office at Lahore. The business of the company was transacted in Calcutta by a firm named B. D. Guha & Co., who were the Chief Agents of the company for Bengal, Bihar and Orissa. Their note-paper was printed with "The Co-operative Assurance Co., Ltd. Lahore." The address was also printed "11 Esplanade East, Calcutta," and on the left hand side the words "B. D. Guha & Co., Chief Agents Bengal, Bihar and Orissa" were also printed. In an advertisement in the *Amrita Bazar Patrika* there were the words "Head Office Lahore. Calcutta Office, 11 Esplanade." The company approved of the advertisement on the ground that it helped business. B. D. Guha & Co., were not merely a post office or conduit pipe through which communications might be sent to the company but they did a considerable amount of business on behalf of the company in which they were allowed a certain amount of discretion :

Held that the insurance company did carry on business in Calcutta: (1899) A. C. 431, *Rel. on* ; ('29) 16 A. I. R. 1929 Mad 347, *Ref.*

[P 3a,b]

C. P. C. —

('40) Chitaley, S. 20 N. 8 Pts. 20, 20a.

('41) Mulla, Page 116.

(b) Civil P. C. (1908), S. 20—Cause of action — Contract of insurance.

Where the proposal for insurance is made in Calcutta and forwarded from Calcutta to Lahore a part of the cause of action arises in Calcutta. [P 3a]

C. P. C. —

('40) Chitaley, S. 20 N. 15.

('41) Mulla, Page 119.

(c) Insurance—"Days of grace"—Due date is to be excluded.

1944 C/1 & 2

In calculating the days of grace the due date should be excluded. The due date cannot be called the date on which grace or favour was shown to the assured. The first day on which such grace could be shown would be the day subsequent to the due date : ('39) 26 A. I. R. 1939 Mad. 159, *Rel. on.* [P 3d,e]

(d) Insurance—Interpretation — Ambiguity must be construed against company.

It is an axiom of interpretation when dealing with insurance companies that if there is any ambiguity in the document it is to be construed against the company. [P 3g]

B. N. Ghosh — for Plaintiff.

Dr. S. Das — for Defendant.

Judgment. — The plaintiff claims the amount due on a policy of insurance on the life of her deceased husband Sudhir Chunder Mullick. Mr. Mullick died intestate on 10th February 1941. The defendant, the Co-operative Assurance Co. Ltd., denies liability on the ground that the policy lapsed on 20th January 1941, for non-payment of premium. They say that it was revived by the insurance company on 5th February 1941 on the faith of a declaration by the assured that he was free from any disease. On the death of the assured it appeared that he was suffering from tuberculosis and the doctor who signed the certificate has reported that he had been suffering from this disease for the previous six months. The medical report is not disputed, and the plaintiff does not rely on the declaration made by or on behalf of her deceased husband. She contends however that the policy did not lapse on the ground that payment of the premium was within the days of grace allowed by the policy. The defendant company carries on business in Lahore, and it is stated in the cause-title that it carries on business and has its office at 11, Esplanade East, Calcutta, within the jurisdiction of this Court. The cause-title has been verified as part of the plaint and as true to

^a the knowledge of the plaintiff. No objection was taken in the written statement save on the general plan that this Court had no jurisdiction to deal with the claim. The following issues were framed :

(1) Has this Court jurisdiction to try this suit? (2) Was the policy in force on 10th February 1941 when the assured died? (3) Is the plaintiff the widow and legal heir of the assured? (4) To what relief, if any, is the plaintiff entitled? The issue whether the plaintiff was the widow and legal heir of the deceased was raised by the defendant, but on the evidence before me there seems to be no doubt ^b that she is entitled to sue. No argument has been addressed on this point by the learned counsel for the defendant company. On the question of jurisdiction, it is argued that the defendant company has no Calcutta office, that the amount due on the policy was not payable in Calcutta but at Lahore where the company has its head office, and further, that the assured died outside the jurisdiction. On the other hand, there is a considerable volume of evidence that the business of the company has been transacted in Calcutta by a firm named B. D. Guha & Co., who are admittedly the Chief Agents of the company for Bengal, Bihar and Orissa. Their note-paper is headed with a green band right across the part about half an inch wide on which is printed "The Co-operative Assurance Co. Ltd., Lahore." The address is also printed "11 Esplanade East, Calcutta," and on the left hand side the words "B. D. Guha & Co., Chief Agents Bengal, Bihar and Orissa" are also printed. Correspondence to the company is addressed to the secretary, "head office" without stating the name of the company. ^c

^d There is in evidence an advertisement in the Amrita Bazar Patrika which contains a picture some 4" x 3" square having in large letters the name of the defendant company. On the top right hand corner are the words "Head Office, Lahore. Calcutta Office, 11 Esplanade." There is no indication anywhere that 11 Esplanade is the office of B. D. Guha & Co., and the clear indication is that the Calcutta Office of the Co-operative Assurance Co. Ltd., is at 11, Esplanade, Calcutta. It is in evidence that this advertisement was put in by the Agents B. D. Guha & Co., who however deny that the company has a Calcutta office and say that the statement is false. The company however approve of the advertisement on the ground that it helps business. There is further evidence that considerable literature setting out the objects of the company and the benefits to be derived from

insuring with the company were sent out to enquirers from Calcutta, that literature purports to be the company's Calcutta office. On the prospectus and table of rates of the defendant company there is stamped with a rubber stamp "Calcutta Office, 11 Esplanade East."

The secretary of the defendant company when his attention was called to these statements regarding the defendant company's Calcutta office said that he was unable to say whether the statement was false or not because in one sense B. D. Guha & Co., were working as agents of the Co-operative Assurance Co., Ltd., and they used the name just to facilitate ^f business. They put, he said, "The Co-operative Assurance Co., Ltd." instead of "B. D. Guha & Co.," because all these things can be had from their office. It is again noteworthy that the affidavit of documents of the defendant company has been sworn by a partner of B. D. Guha & Co. The same gentleman who is a partner in B. D. Guha & Co., verified the application for leave to file the written statement, he also swore affidavits in the proceedings, the reason being, according to the secretary of the company, that it would save him considerable inconvenience. Whatever the reason may have been it is clear that the firm ^g of B. D. Guha & Co., are not merely a post office or conduit pipe through which communications may be sent to the defendant company but that they do a considerable amount of business on behalf of the defendant company in which they are allowed a certain amount of discretion. Mr. Bose has also said that they had sub-agents acting for the company under them and that B. D. Guha & Co., does work for the defendant company alone. I have been referred to the case reported in (1899) A. C. 431,¹ where the Earl of Halsbury L. C. quoted with approval the words of Bacon V. C. :

"They hire an office, write up their name, and ^h beyond all question stamp upon themselves and upon their place of business here the assumption that here they carry on their business."

And it was held that in those circumstances the appellants in the house of Lords were resident within the jurisdiction. This question was considered by the High Court of Madras in a case reported in 56 M.L.J. 299,² where the learned Judges held that a life assurance company which had its head office at Bombay and agents at Madras who had no discretion but

1. (1899) 1899 A.C. 431 : 68 L. J. P. 104 : 80 L.T. 845 : 8 Asp. M. C. 550 : 15 T. L. R. 424, *Law Compagnie Generale Transatlantique v. Thomas Law & Co.*

2. ('29) 16 A. I. R. 1929 Mad. 347 : 121 I. C. 155 : 56 M. L. J. 299, *G.D. John v. Sambamurty Aiyar.*

a acted merely as a post office forwarding proposals and sending monies to the head office could not be said to carry on business within the meaning of R. 1 of O. 20 of the Original Side Rules. It is noteworthy that in this suit leave to sue has been obtained under cl. 12 of the Letters Patent, and it appears to me that there is jurisdiction in this Court in that part of the cause of action arose in Calcutta inas-
 b much as the proposal was made in Calcutta and forwarded from Calcutta to Lahore. In view of the evidence to which I have referred I should also be inclined to hold that the defendant company did in fact carry on business in Calcutta by means of B. D. Guha & Co. The question then arises whether the policy lapsed. This question turns almost entirely on the method of computation of the days of grace. The policy provides that all premiums are payable in advance at the head office at Lahore on or before the due date. It is then provided that premiums are payable yearly but to suit the convenience of the assured half-yearly, quarterly and monthly premiums will be accepted. The monthly premium is one twelfth of the annual premium increased by $6\frac{1}{2}$ per cent.

In this case the assured paid his premium
 c monthly and as learned counsel has put it "he bought the right to do so owing to the increase in the amount of the premium." The policy further provides "a grace of 30 days without interest charge shall be granted for payment of yearly and half-yearly premiums and 15 days for quarterly and monthly premiums." The due date for payment of the premium with which we are concerned was 6th January. It was not paid on that date and the assured was entitled to 15 days grace. The premium was paid on 21st January. The company claims that the days of grace should be calculated by including in the calculation
 d 6th January. If that is done the premium was one day late. On the other hand it is argued on behalf of the assured that in calculating days of grace the due date should be excluded. That has been held in a number of cases which are summed up in the decision of the Madras High Court reported in A.I.R. 1939 Mad. 159.³ There it is pointed out in conformity with the decisions in a number of English cases that in calculating the days of grace the due date should be excluded. The meaning of "days of grace" is explained, namely, that in the event of payment not being made by the due date certain extra days should be allowed by way

of grace or favour. The due date cannot possibly be called the date on which grace or favour was shown to the assured. The first day on which such grace could be shown would be the day subsequent to the due date. If the terms of the policy are construed in this way, there was no lapse, and no necessity for revival, and as I have pointed out that is the normal method on which days of grace should have been calculated.

The defendant company however rely on a notice dated 8th February which is subsequent to the date of the alleged lapse, and contains a printed notice of the manner in which days of grace are calculated when the half yearly instalment of premium falls due. f It is suggested that the assured should appreciate from this notice that the days of grace with regard to every type of instalment of premium would be calculated in the same manner, namely, by including within the days of grace the due date. The only evidence that notices of this nature were sent to the assured was in answer to the following question :

"Look at this document, did you send a notice like this every month to the assured ?—Yes."

It is most unfortunate that on an important point like this a very leading question should have been put to the witness, for it makes his answer valueless. There has been no attempt to prove apart from this evidence that notices of this nature were sent to the assured. Even had they been sent, I am very doubtful whether a company would be entitled to rely upon them. It is an axiom of interpretation when dealing with insurance companies that if there is any ambiguity in the document it is to be construed against the company. In the policy there is no explanation of the method in which days of grace should be calculated and it would be natural to presume that they would be approved by the Courts. Even supposing this notice had been sent the assured might well be under the impression that the stated method of calculating days of grace is confined to half yearly instalments as in the example set out in the notice. If all instalments were to be calculated in the same manner nothing could be easier than for the company to say so. I hold that the Court has got jurisdiction that the policy was in force on 10th February 1941, and the plaintiff is entitled to a decree for Rs. 2000 with profits and interest from 10th February 1941 to the date of the death of the assured. Costs on Scale No. 2 including the costs of the *de bene esse* examination. I certify for two counsel.

R.K.

Suit decreed.

3. ('39) 26 A. I. R. 1939 Mad. 159 : 180 I. C. 156 : (1938) 2 M. L. J. 1020, T. G. Rajan v. Asiatic Government Security Life Assurance Co., Ltd.

A. I. R. (31) 1944 Calcutta 4

AKRAM AND PAL JJ.

*Rohini Kumar Chakrabarty —**Plaintiff — Appellant*

v.

Niaz Mahammad Khan — Respondent.

Appeal No. 396 of 1940, Decided on 26th January 1943, from appellate decree of Dist Judge, Tippera, D/- 3rd October 1939.

(a) Civil P. C. (1908), S. 100—Malicious prosecution — Suit for — Finding as to existence of reasonable and probable cause whether one of law or fact.

Per *Akram J.* — In a suit for malicious prosecution the findings that the plaintiff has completely failed to prove that the defendant was the real prosecutor, that the prosecution was instituted against him without any reasonable or probable cause and that the prosecution was instituted with a malicious intention, are all findings of fact which will not be interfered with in second appeal however erroneous they may be when there is no error or defect in the procedure and the lower appellate Court had before it evidence in support of the findings: ('29) 16 A.I.R. 1929 P. C. 190, *Rel. on.* [P 7g, h]

Per *Pal J.* — In an action for compensation for malicious prosecution the question whether or not there was a reasonable or probable cause for the prosecution is a question of law to be inferred from certain facts: 1905 A. C. 168 and 1938 A. C. 305, *Rel. on.* [P 11f]

C. P. C. —

('40) Chitaley, Ss. 100 and 101, N. 52 Pts. 9 and 10.
(‘41) Mulla, Page 367 Pt. (g).

(b) Civil P. C. (1908), O. 6, R. 17 — *Plaint — Construction of —* *Plaint faintly disclosing suit as one for compensation for false and malicious prosecution—Amendment held did not change character of suit.* (Per *Akram J.*)

In the original *plaint* the cause title showed that the suit was one in respect of malicious prosecution. By an amendment of the *plaint* the word "malicious" was omitted after the word "false" and the expression "malicious prosecution" after the words "illegal arrest":

Held that pleadings drafted in *mofussil* in India were not to be too strictly construed: ('34) 21 A.I.R. 1934 P. C. 130, *Rel. on.* [P 8b]

As the original *plaint* read as a whole indicated, though faintly, that the suit was one for compensation for false and malicious prosecution the amendment had not in any manner changed the character of the suit depriving the defendant of his valuable right of setting up the bar of limitation and did not amount to introducing new matter or new cause of action. The suit therefore should be taken to have been instituted on the date when the original *plaint* was filed. [P 8b]

C. P. C. —

('40) Chitaley, O. 6 R. 17, N. 5 Pt. 2; O. 6 R. 17, Note 12.

(‘41) Mulla, Page 591, Note "Leave to amend when given" and Page 593, Note 3 ("Except in very special cases").

(c) Limitation Act (1908), Arts. 23, 22 and 2 — *Suit for compensation for malicious prosecution against Government servant—Art. 23 and not Art. 2 held applied—Claim for illegal arrest whether falls under Art. 2 or Art. 22.*

The plaintiff objected to the Rural Reconstruction Society demarcating his land and used abusive language towards one of the persons working on behalf of the society. On a complaint being made the chairman of the society who was also a Magistrate took cognizance of the offence as a Magistrate and prosecuted the plaintiff under S. 504, Penal Code, and ordered his arrest. The prosecution subsequently having been withdrawn, the plaintiff brought a suit for compensation for malicious prosecution and illegal arrest against the Magistrate:

Held that (1) (Per *Division Bench*) in view of the frame of the suit the claim in respect of compensation for malicious prosecution fell under Art. 23 which was the more specific article and not under Art. 2 which applied to cases where the defendant acted under colour of statute; [P 8c]

(2) (Per *Akram J.*) — the claim for compensation for illegal arrest fell within the scope of Art. 2 which applied to cases of compensation for doing or for omitting to do an act pursuant to an enactment i. e., where the defendant acted under colour of statute; [P 8d]

(Per *Pal J.*) — the claim for compensation for false imprisonment was governed by Art. 22. [P 11b]

Limitation Act.

(‘42) Chitaley, Art. 2, N. 3 Pt. 1 and Art. 23, N. 1.

(‘38) Rustomji, Page 540, Note "Conflict between this and other articles" and Page 626, Note "Malicious prosecution."

(d) Judicial Officers' Protection Act (1850), S. 1—*Arrest within competence of Magistrate—Claim for compensation for wrongful arrest is not maintainable.* (Per *Division Bench.*)

When the arrest was made as a judicial act and was within the competence of the Magistrate a claim for compensation for wrongful arrest is not maintainable in view of the provisions of the Act: 12 All. 115, *Rel. on.* [P 8e]

(e) Tort—Malicious prosecution and wrongful arrest — Distinction — Onus — Action for compensation for malicious prosecution and wrongful arrest—In case of wrongful arrest preliminary issue whether defendant was entitled to protection under Judicial Officers' Protection Act decided on allegations in *plaint* in defendant's favour — In appeal plaintiff held entitled to be heard on merits — Appeal held could not be disposed of on findings in case for malicious prosecution. (Per *Pal J.*)

A case for wrongful arrest and one for malicious prosecution do not stand on the same footing for the purpose of disposal on the merits. Any interference with a man's personal liberty is *prima facie* wrongful and therefore has to be justified. As regards malicious prosecution, however, the position is quite different. Any one is *prima facie* entitled to set a Court of justice in motion, and consequently the person complaining of such action must prove affirmatively the non-existence of any reasonable and probable cause for it. [P 9g, h]

In an action for compensation for malicious prosecution and wrongful arrest the preliminary issue as to whether the defendant was entitled to protection under the Judicial Officers' Protection Act with regard to the wrongful arrest was decided on the allegations in the *plaint* in favour of the defendant and the claim as to malicious prosecution was decided on the merits in the plaintiff's favour. The plaintiff filed an appeal from the decision in the case of wrongful arrest and the defendant appealed against the decision in the case of malicious prosecution:

a **Held** that the plaintiff in the appeal against the decision on the preliminary issue regarding the defendant's protection under the Judicial Officers' Protection Act was entitled to be heard on the merits. The appeal could not be disposed of on the conclusions of fact arrived at by the appellate Court in the case for malicious prosecution as the two cases stood on a different footing for the purpose of disposal on the merits. [P 10a]

(f) **Judicial Officers' Protection Act (1850), S. 1 — Action for wrongful arrest — Conditions requisite for protection of defendant under Act, stated. (Per Pal J.)**

b In an action for compensation for wrongful arrest in order to entitle the defendant to the protection of the Act it must be shown: (1) that the defendant was acting judicially while ordering the arrest of the plaintiff; (2) that he made that order in the discharge of his judicial duty; (3) (a) that he believed himself to have jurisdiction to order the arrest, (b) that the belief was in good faith. As regards the third requirement actual existence of jurisdiction to do or to order the doing of the act is not necessary. The belief of the defendant that he had jurisdiction to order the arrest and detention of the plaintiff would suffice provided this belief was in good faith. [P 10b,c]

(g) **Judicial Officers' Protection Act (1850), S. 1—"Good faith"—Proof of. (Per Pal J.)**

The existence of a reasonable cause for the act complained of supplies the ground for the existence of "good faith" under S. 1. [P 10h]

(h) **Malicious Prosecution—Nature of—Action for—Essentials to be proved. (Per Pal J.)**

c Any one is prima facie entitled to set a Court of justice in motion. Prosecuting is not thus prima facie a tort and is not a tort in itself. For reasons of public policy the law gives protection to persons prosecuting, even where there is no reasonable and probable cause for the prosecution. It is only when the person abuses his privilege for the indulgence of his personal spite that he loses the protection and renders himself liable to action, not for the malice but for the wrong done in subjecting another to annoyance, expenses of a causeless prosecution and possible loss of reputation. To sustain a claim for malicious prosecution the plaintiff has to prove: (1) That there was want of reasonable and probable cause for the prosecution; (2) That the proceedings were initiated in a malicious spirit, i. e., from an indirect and improper motive and not in furtherance of justice. Want of reasonable and probable cause and existence of malice must concur in order to constitute the wrong of malicious prosecution. If there is reasonable and probable cause for the prosecution then, even though the prosecution is started to satisfy a personal grudge and is prompted by malice and the worst of motives the prosecutor will not be liable for an action for malicious prosecution. [P 11c,d,e]

(i) **Civil P. C. (1908), S. 100 — Finding that Magistrate took cognizance of offence at particular time will not be interfered with in second appeal. (Per Division Bench.)**

Taking cognizance of an offence is a mental act. When the Magistrate himself deposes as to the time when he took cognizance of the offence and he is believed by the final Court of fact, the second appellate Court will not interfere with the finding that the Magistrate took cognizance of the offence at a particular time. [P 12d]

Kali Kinkar Chakravarty and Syama Prosanna Deb — for Appellant.

Carden Noad and Serajuddin Ahmed — for Respondent.

Akram J. — This appeal by the plaintiff arises out of an action in damages for malicious prosecution and wrongful arrest. The plaintiff is a retired Sub-Inspector of Police, a practising mukhtear and Secretary of the Mukhtear's Bar Association. Defendant 1 is a member of the Indian Civil Service and was the Sub-divisional Magistrate of Brahmanbaria up to 20th December 1936, defendant 2 was the Court Sub-Inspector of Brahmanbaria but he died during the pendency of the suit, defendant 3 one Chand Ali, and defendant 4 one Abu Mean are labourers. Briefly stated, the plaintiff's case was that on 5th April 1935, a society was formed under the name and style of the Brahmanbari Co-operative Rural Re-construction Society, Ltd., and was registered under Act 3 of 1912. Defendant 1 was the chairman of the society, the society thereafter undertook the re-excavation of a khal, known as the Kurulia khal and accordingly (16th and 17th December) certain persons on behalf of the society went to make an alignment and while doing so included in it a strip of land (about 12 cubits in width) belonging to the plaintiff and cut down some of his bamboo clumps and damaged some of his mustard crops; that later on (23rd December) an Amin of the Sarail Estate, named Atul Chandra Shome, appeared with a number of labourers and began to encroach further upon the plaintiff's lands, the plaintiff protested, but it was of no avail and more damage was done, that on 26th December 1935, a meeting of the society was held in which defendant 1 acting as president directed that those present should commence re-excavation of the khal from 1st January 1936 and threatened saying that "the absentees would be beaten with shoes and canes and harassed," that the co-villagers of the plaintiff, Basu Mean and others, sought his advice (27th December 1935) and he told them that no one could take away another's lands by force or compel him to work against his will, that this was reported to defendant 1 who made up his mind to misuse his power as Sub-divisional Officer and teach the plaintiff a lesson and accordingly on 28th December 1935, defendant 1 with a number of men proceeded along the khal and on arriving opposite the plaintiff's house sent for the plaintiff and, when he came, gave a push to him and then questioned in an angry tone why he objected to his land being demarcated, that the plaintiff thereupon attempted to explain his position saying that he was not living under Hitler's Government but under British Administration but defendant 1 became enraged and pointed out that he was the Sub-divi-

a sional Officer and when the plaintiff replied that at the time, defendant 1 was the chairman of the Rural Re-construction Society, he called the plaintiff badmash, scoundrel and alleged that he abused people. When plaintiff asked whom he had abused defendant 1 pointed to one Kala Gazi, who on being questioned said that he had been abused.

Defendant 1 after that continued his abusive language and finally ordered two bye-standers to arrest the plaintiff and take him to Brahmanbaria Jail. Chand Ali and Abu Mean (defendants 3 and 4) then arrested the plaintiff and took him to the jail, the jailor however b refused to admit the plaintiff without a warrant and the plaintiff was kept at the jail gate until 6 P. M. When defendant 1 arrived he took the plaintiff into a vacant room at the jail gate, abused and threatened him again and suggested that he should apologize, but as the plaintiff refused to do so, defendant 1 caused Chand Ali (defendant 3) to make a false verbal complaint to the effect that the plaintiff had abused him, took down his complaint in writing and then called upon the plaintiff to plead to a charge under S. 504, Penal Code. When the plaintiff raised objection to the form of the trial, defendant 1 directed that he c should be confined in jail and released upon furnishing bail of Rs. 5000. The plaintiff remained detained in jail from 28th December 1935, till 2nd January 1936 when he was produced before Mr. A. Rahman who released him on bail, the case was then adjourned to 23rd January upon application being made for moving the High Court under S. 526, Criminal P. C. The records were received back from the High Court on 5th June and on the 6th order was passed directing the plaintiff to appear on the 15th. This order however was not communicated to the plaintiff and he therefore left for Mymensingh and Comilla d and only on his return home on 17th June got a notice dated 8th June handed over by his son, directing the plaintiff to attend Court on 15th June. He attended Court on the 17th but got no information as to the order passed on the 15th, he then applied for copies which were supplied on the 18th and came to know from these that a non-bailable warrant of arrest had been issued against him on 15th June. He then went to Comilla where he fell ill and therefore sent an application supported by a medical certificate for adjournment but defendant 1 refused to grant the application and on the date fixed, 25th June, issued a proclamation and a writ of attachment holding that the plaintiff was an absconder, the plaintiff arrived home on 29th June and was placed

under arrest on the next day. On 1st July e 1936, the plaintiff was taken to the house of defendant 1 who taunted, humiliated and tortured him and then transferred the case to Mr. Aminulla, Deputy Magistrate, First Class, who released the plaintiff on bail of Rs. 250. The plaintiff then on 8th July, applied to the District Magistrate, Tipperah, for a transfer of the case, this was finally granted and the case was withdrawn to the file of the Additional District Magistrate. On 11th September 1936, the prosecution was withdrawn at the instance of the Crown on administrative grounds. The plaintiff asserted that defendant 1 and not defendant 3 (Chand Mean) was f the real prosecutor, that the prosecution was malicious and without any reasonable or probable cause and had terminated in his favour, that he was entitled therefore to damages to the extent of Rs. 2500 for malicious prosecution and for wrongful arrest.

Defendant 1 in his written statement denied inter alia that he was the real prosecutor or that he was actuated by malice or acted in any manner mala fide in respect of the judicial proceedings. His case was that when the Amin and his labourers went to the locality on 23rd December 1935 finally to demarcate the new alignment, the plaintiff came out of g his house, had a look at the map and then abused the Amin and his men in filthy language which might have led to a breach of the peace if they had not restrained themselves, that the Amin, Chand Ali and other labourers, on 24th December 1935, came to defendant 1 and made a verbal complaint against the plaintiff for an offence under S. 504, Penal Code, and defendant 1 told them to wait as he thought that he would better talk to the plaintiff and tell him not to behave in that fashion, that on the 26th a public meeting was called to which all the leading gentlemen were invited, in that meeting the people volun- h teered for getting various blocks excavated, that on 28th December 1935, defendant 1 went to inspect the Khal and when he arrived at village Ulchapara, Chand Ali repeated his complaint against the plaintiff, the defendant thereupon sent his orderly to call the plaintiff who came after some delay and, when asked why he had abused Chand Ali made an insolent gesture, and said that he would not answer the question. The defendant then reminded the plaintiff that he was before the Sub-Divisional Officer to whom a complaint had been made by the Amin and Chand Ali for a criminal offence and that he could take cognisance at once but the plaintiff questioned the defendant's authority and dared him to do

- a his worst and after this continued to behave in such a manner that there was no other alternative left for the defendant but to take cognisance of the offence under S. 504, Penal Code, that the defendant therefore after doing so in his capacity of a Magistrate ordered the labourers who were with him to arrest the plaintiff. The day being a holiday defendant directed that the plaintiff should be taken to the sub-jail; the defendant after finishing the inspection of the Khal, arrived at the sub-jail about an hour later and then sent for his bench clerk and recorded the statement of the complainant under S. 200, Criminal P. C.
- b The defendant had been acting throughout judicially and was protected under the Judicial Officers' Protection Act (18 of 1850). It is not necessary for the appeal before us to set out here the course which the proceeding under S. 504, Penal Code, took subsequent to the arrest. It will be sufficient to state that the case against the plaintiff was withdrawn on 11th September 1936.

The trial Court on the evidence adduced held that defendants 3 and 4 were not the prosecutors and dismissed the suit as against them. It however found that defendant 1 was the prosecutor and was liable for compensation for malicious prosecution though not liable in respect of the claim for wrongful arrest. It accordingly decreed the suit in part for Rs. 1200 as against defendant 1. Defendant 2, as already stated, had died pending the suit. Against that decision defendant 1 filed an appeal (No. 7 of 1939) and the plaintiff filed a cross-objection against rejecting certain evidence tendered by him, and also preferred a substantive appeal (No. 8 of 1939) against defendant 1 only regarding the dismissal of the claim for illegal arrest. The Court below decreed defendant 1's appeal (No. 7 of 1939) and dismissed the plaintiff's cross-objection and appeal (No. 8 of 1939). From this decision the plaintiff has preferred the present appeal. It has been urged before us by the learned advocate for the appellant: (1) That the inferences drawn by the Court below are incorrect and that the findings arrived at are unwarranted and unjustified on the evidence on the record. In the appeal (No. 7 of 1939) before the lower appellate Court the findings of the learned District Judge were as follows :

"(a) There can be no doubt whatever in my opinion and finding that Chand Ali, accompanied by the amin and other persons, went to defendant 1's house on the morning of 24th December and made a complaint. In view of this finding, the whole edifice of the plaintiff's case falls to the ground as does a house built of playing cards when blown upon by the wind. Not only has the plaintiff failed to prove that Chand

Ali did not make a complaint and that he had no reasonable and probable cause to make a complaint, but defendant 1 has proved beyond all reasonable doubt that Chand Ali had very definite grounds for a complaint and actually made one on 24th December. It was, of course, a verbal complaint.

(b) I find then that Chand Ali did in fact report to defendant 1 what took place on 23rd December and that, on the basis of that report defendant 1 took cognizance of an offence punishable under S. 504, Penal Code.

(c) It is clear that defendant 1 having taken cognizance of the complaint made on 24th December enquired at Ulchapara into the facts alleged by Chand Ali. He was acting as a Magistrate and when the plaintiff refused to co-operate in the enquiry, defendant 1 acted under his ordinary powers and caused him to be arrested.

(d) It was perhaps unnecessary for defendant 1 to record Chand Ali's statement at that stage of the proceedings, for he had already taken cognizance under S. 190 (1) (c), Criminal P. C., but that is of no possible consequence here. Judicial errors have judicial remedies. I find that there is nothing in the evidence which proves affirmatively that defendant 1 was the real prosecutor and there was no reasonable and probable cause for the institution of proceedings. On the contrary, I find expressly and definitely on the review of the evidence adduced by both parties, that there was reasonable and probable cause and that the real prosecutor was Chand Ali.

(e) I find — to reiterate once again — that the plaintiff has completely failed to prove that defendant 1 was the real prosecutor, that the prosecution was instituted against him without any reasonable or probable cause and that the prosecution was instituted with a malicious intention, that is, not with the mere intention of carrying the law into effect, but with an intention which was wrongful in point of law. As a corollary I find that there was no wrongful arrest and that all the acts done by defendant 1 were done by him in his capacity of a Magistrate. I find also that the allegations in the plaint are malicious, false and libelous and that they were made without any justification whatsoever."

The above findings were arrived at after a full consideration, and discussion in great detail, of the evidence adduced by the parties and I do not see how we are entitled to interfere with them bearing in mind the observations of their Lordships of the Judicial Committee in 33 C. W. N. 893.¹ The findings are all findings of fact and no error of law or of procedure by the learned Judge in respect of them has been brought to our notice by the learned advocate appearing for the appellant. In my opinion, the above findings are sufficient to dispose of the present appeal on the merits as concluded by the findings of the final Court of facts.

(2) Next it has been argued that the Court below erred in law in holding that the suit in respect of the claim for compensation for malicious prosecution was barred by limitation under Art. 23 and also Art. 2, Limitation

1. ('29) 16 A. I. R. 1929 P. C. 190 : 117 I. C. 1 : 25 N. L. R. 121: 56 I. A. 280: 33 C. W. N. 893 (P.C.), *Ramji Patel v. Raokishore Singh*.

- a Act, on the basis that the suit must be regarded to have been instituted not on the date when the plaint was originally presented (2nd January 1937) but on the date when application for its amendment was made (30th May 1938). It appears that the word "malicious" was omitted after the word "false" in Para. 44 of the plaint and the expression "malicious prosecution" after the words "illegal arrest" in Para. 45. In the original plaint the cause title however showed that the suit was one in respect of malicious prosecution, Para. 49 of the plaint also made reference to malicious prosecution and further more, Issue 5 was
- b joined on the assumption that there was a claim for compensation for malicious prosecution. We are of opinion that the original plaint read as a whole indicated, though faintly, that the suit was one for compensation for false and malicious prosecution and that the amendment has not in any manner changed the character of the suit depriving the defendant of his valuable right of setting up the bar of limitation. Remembering that pleadings drafted in mofussil in this country are not to be too strictly construed (38 C. W. N. 806²) I hold that the amendment of the plaint was rightly allowed by the trial Court and that it
- c did not amount to introducing new matter or new cause of action. In my opinion the suit should be taken to have been instituted on 2nd January 1937. It also seems to me that this part of the claim would be governed by Art. 23 which is the more specific article and not by Art. 2, Limitation Act, which applies to cases of compensation for doing or for omitting to do an act pursuant to an enactment, i. e., where the defendant acts under colour of statute. This part of the suit therefore in view of the frame of the suit in respect of compensation for malicious prosecution, fell, in my opinion, under Art. 23, Limitation
- d Act, and was not barred by limitation. The other portion of the claim, viz., for compensation for illegal arrest however, in my opinion, falls within the scope of Art. 2 and is as such barred by limitation.

(3) Next it has been contended that as the plaint itself does not disclose that the illegal arrest was made by defendant 1 in his capacity of a Magistrate, the order dated 21st February 1939, deleting the portion of the claim for illegal arrest upon the finding that it was not maintainable in view of the provision of Act 18 of 1850 could not be sustained. As regards this contention it is disclosed from

2. ('34) 21 A. I. R. 1934 P. C. 130 : 149 I. C. 480 : 9 Luck 178 : 61 I. A. 224 : 38 C. W. N. 806 (P.C.), Shomeshwar Dutt v. Tribhawan Dutt.

the plaint paras. 9, 12 and 17 that the arrest was ordered by defendant 1 in his capacity of a Magistrate and it is so found by both the Courts below — it is apparent that the arrest was made as a judicial act and was within the competence of the Magistrate, the order therefore dated 21st February 1939 deleting from the plaint the portion containing the claim for compensation for wrongful arrest as not maintainable in view of Act 18 of 1850 was rightly made : *vide* 12 ALL. 115.³ These contentions by the appellant relating to limitation and also to maintainability of the suit mentioned above do not seem to me to be of much importance any longer for the purpose of the present appeal. In view of the findings on the merits arrived at by the Court below, they have become now merely of academical interest and are of no practical value to the appellant.

(4) Lastly it has been pointed out that no objection being taken in the written statement on the basis of S. 270 (2), Government of India Act (1935), and no issue being framed upon it, the Court of appeal below was in error in holding that absence of good faith not being established by the plaintiff, the section operated as a bar to the maintainability of the suit. As already observed, I do not think it would serve any useful purpose to go into and deal with contentions of this nature in the present appeal and we therefore refrain from deciding this point. The appeal is concluded by findings of fact and is accordingly dismissed with costs.

Pal J. — The cases of the respective parties are given by my learned brother in his judgment and I need not repeat them here. The plaintiff's claim in the suit was laid on two distinct counts, viz., (1) compensation for illegal arrest and false imprisonment, (2) compensation for a malicious prosecution. As regards his claim for compensation for illegal arrest and false imprisonment, defendant 1 pleaded protection under the Judicial Officers' Protection Act (Act 18 of 1850) and filed an application for the striking out of the relevant paragraphs from the plaint. The learned Subordinate Judge having rejected this application of the defendant, the matter was brought before this Court and this Court ultimately made the following order :

"If the Subordinate Judge finds that upon the case made in the plaint defendant 1 is entitled to the protection of the Judicial Officers' Protection Act with regard to that portion of the claim which relates to illegal arrest he may make a proper order striking out those portions of the plaint which relate

3. ('90) 12 All. 115 : 1890 A. W. N. 32, Teyen v. Ram Lal.

a to such claim. If, on the other hand, he finds that defendant 1 is not entitled to such protection, he will proceed to deal with the suit according to law."

Thereupon the learned Subordinate Judge heard this matter on 21st February 1939, as a preliminary issue taking the facts to be as they appeared in the plaint, and held that defendant 1 was protected by the Judicial Officers' Protection Act and thus was not liable for the alleged illegal arrest. Pursuant to the above order of this Court he accordingly struck out the portions of the plaint which related to this claim. Thereafter the hearing of the suit so far as the claim for compensation for malicious prosecution is concerned b commenced on 22nd March 1939, and the claim was decreed in part by the learned Subordinate Judge as against defendant 1 on 1st May 1939. Defendant 1 preferred an appeal from this portion of the decree and the plaintiff preferred an appeal from the order dated 21st February 1939, evidently treating that as a decree dismissing his claim for wrongful arrest and as a part of the final decree in the suit. This was Appeal No. 8 before the District Judge. The appeal preferred by defendant 1 from the decree against him for compensation for malicious prosecution was Appeal No. 7. c In disposing of Appeal No. 8 the learned District Judge observed as follows :

"It is contended in this Court that no matter what may be the findings and the result of Appeal No. 7 this Court, in dealing with Appeal No. 8 is obliged to deal with the order of the learned Subordinate Judge taking the facts to be as they appear in the plaint. At the very outset, it may be said that it would be merely absurd to forget all the findings arrived at in Appeal No. 7 and to proceed to deal with Appeal No. 8 as if the tort of malicious prosecution had never been tried. It has been found that defendant 1 acted on the basis of a report made by Chand Ali, that he went out to enquire into the circumstances of the abuse, and the breach of the peace which nearly followed in consequence of it, and that, as a Magistrate, he ordered the arrest of the plaintiff. Now these findings are binding on the plaintiff and are res judicata. It is merely absurd to suggest that d in spite of these findings the Court should proceed to decide whether the suit should continue in so far as the tort of wrongful arrest was concerned. It would be impossible to try the tort of wrongful arrest without retrying the issues which have already been heard and determined."

Mr. Chakrabarty appearing for the appellant before us contends: (1) that so far as the plaintiff's case for wrongful arrest is concerned, the learned District Judge went wrong in disposing of it on the evidence in the case for malicious prosecution; (2) that the matter having been disposed of by the Court of first instance only on the issue whether the Judicial Officers' Protection Act (Act 18 of 1850) was a bar to the maintainability of the suit in this respect and that Court having heard

and decided this as a preliminary issue taking e the facts to be as alleged in the plaint, the learned District Judge in disposing of Appeal No. 8 went wrong in going beyond the allegations made in the plaint and in taking into consideration the evidence adduced in the case for malicious prosecution; (3) that the facts given in the plaint did not bring defendant 1's acts in this respect within the protection of the Judicial Officers' Protection Act and consequently the plaintiff is entitled to a hearing of his claim in this respect on its merits; (4) that even if the case be decided on the evidence already on record in connection with the case for malicious prosecution the plaintiff is entitled to a decree inasmuch as (a) the factum of arrest and imprisonment of the plaintiff at the instance of defendant 1 is admitted, and (b) defendant 1 has failed to establish any justification for this action which is prima facie wrongful. f

As regards the first two points urged by Mr. Chakrabarty it must be confessed that the judgment of the learned District Judge entitles the appellant to raise these contentions. This Court directed the preliminary issue raised to be heard and decided only on the basis of the allegations made in the plaint and the learned Subordinate Judge g decided that preliminary issue as directed by this Court. If this decision was wrong the plaintiff would prima facie be entitled to a hearing of the case on the merits. A case for wrongful arrest and one for malicious prosecution do not stand on the same footing for the purpose of disposal on the merits. An arrest is prima facie wrongful and requires to be justified by the defendant. Freedom of the person is a very valuable right recognised by the system of law under whose protection the plaintiff lives. This freedom includes immunity not only from the actual application of force, but from every kind of detention h and restraint not authorised by law. The infliction of such restraint is the wrong of false imprisonment. Any interference with a man's personal liberty is prima facie wrongful and, therefore, has to be justified. As regards malicious prosecution, however, the position is quite different. Any one is prima facie entitled to set a Court of justice in motion, and consequently the person complaining of such action must prove affirmatively the non-existence of any reasonable and probable cause for it. In this particular case most of the material common incidents for the two cases have been found against the plaintiff in relation to his claim for compensation for malicious prosecution on the ground of his

a failing to adduce sufficient evidence in proof of the same. A finding arrived at thus will be of no help to the defendant in the case for false imprisonment, the onus in that case being on him to justify his action. In these circumstances it would certainly be unfair to drive the plaintiff out of Court on the so-called conclusions of fact arrived at by the Court of appeal below in the case for malicious prosecution, if the decision of the learned Subordinate Judge on the preliminary issue be found unsupportable on the allegations made in the plaint. Section 1, Judicial Officers' Protection Act (Act 18 of 1850) stands thus:

b. "No Judge, Magistrate . . . acting judicially shall be liable to be sued in any civil Court for any act done or ordered to be done by him in the discharge of his judicial duty Provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of; . . ."

The plaint itself discloses that defendant 1 is a Magistrate. The question, therefore, is whether the allegations made in the plaint disclose: (1) that the defendant was acting judicially while ordering the arrest of the plaintiff; (2) that he made that order in the discharge of his judicial duty; (3) (a) that he believed himself to have jurisdiction to order the act, (b) that the belief was in good faith.

c. As regards the third of the above three requirements it must be noticed that actual existence of jurisdiction to do or to order the doing of the act is not necessary. The belief of the defendant that he had jurisdiction to order the arrest and detention of the plaintiff would suffice provided this belief was in good faith. There may be some difficulty as to the exact meaning of this requirement regarding 'good faith'. 'Belief' itself is a mental condition and is subjective. A question may arise whether in order to see whether a person believed something in good faith it is necessary to see whether there existed any reasonable cause for this belief or whether it would suffice if he himself thought that there was reasonable cause. A further question may arise if we are to apply the subjective test, namely, whether this test would apply to all cases irrespective of the question whether the defendant is a magistrate, a police officer or a private individual. It may be that in some of these cases there will be no justiciable issue at all, the act being an executive act not open to legal review. The most stringent construction against the persons seeking the protection of the section will be to require objective existence of reasonable cause to support 'belief in good faith',—to read the section as imposing an objective condition precedent of fact, namely, the existence of reasonable cause to supply grounds of

the officer's honest belief. Section 65, Criminal P. C., empowers any magistrate to arrest in the following terms:

"Any Magistrate may at any time arrest or direct the arrest, in his presence, within the local limits of his jurisdiction, of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant."

Section 204 of the Code enacts when a Magistrate can issue a warrant. The section says:

"If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and if the case appears to be one in which, according to that column (Fourth column of Sch. 2) a warrant should issue in the first instance, he may issue a warrant. . . ."

The allegations made in para. 11 of the plaint show that the plaintiff knew that defendant 1 was the Sub-Divisional Magistrate and that he was reminded by defendant 1 of this fact. In para. 12 of the plaint the plaintiff gives the incident leading to his arrest under the order of defendant 1. The allegations made therein disclose: (1) that defendant 1 had been informed by one Kala Gazi that the latter had been abused by the plaintiff; (2) that Kala Gazi reiterated this information on the spot in the presence of the plaintiff. The allegations of Kala Gazi, if established, would constitute an offence under S. 504, Penal Code. Column 4 of Sch. 2 referred to in S. 204, Criminal P. C., quoted above, mentions this S. 504, Penal Code, as a case in which warrant should issue in the first instance. Section 190 (1) (c) of the Code enacts that

any Sub-Divisional Magistrate may take cognizance of any offence upon information received from any person other than a police officer, or upon his own knowledge or suspicion that such offence has been committed.

According to the allegations made in the plaint there was this information received from a person other than a police officer. It would be competent for the Sub-Divisional Magistrate to take cognizance of the offence on this information and as soon as he would take such cognizance he would be competent to direct the arrest of the accused in his presence. No doubt the plaint also says that these allegations of Kala Gazi were false. But that allegation of the plaintiff even if communicated to the Magistrate then and there would not disentitle the Magistrate to take cognizance of the offence under S. 190 (1) (c), Criminal P. C. The place was admittedly within the local limits of the Magistrate's jurisdiction. In these circumstances the very facts stated in the plaint would disclose reasonable cause supplying the ground for honest belief of the Magistrate that he had jurisdiction to act in the manner he did on that occasion.

a The learned Subordinate Judge took this view, and, in my opinion, he correctly held that so far as this part of the plaintiff's claim is concerned defendant 1 was within the protection of the Judicial Officers' Protection Act. The allegations in the plaint sufficiently support the conclusion that the defendant was acting judicially while ordering the arrest of the plaintiff and that he made that order in the discharge of his judicial function, though the action taken by him might not have been quite judicious.

In this view it becomes unnecessary for me to consider whether the claim for compensation for false imprisonment would have been barred by limitation under Art. 2, Limitation Act. The learned District Judge held this article to be applicable to the claim. Article 19 makes specific provision for suits for compensation for false imprisonment. Wrongful arrest and detention constitute the injury of false imprisonment. Even if not, it is certainly an injury to the person. It is certainly an infringement of the very valuable right of freedom. Article 22, Limitation Act, makes residuary provision for suits relating to such tortious acts. Coming now to the second part of the plaintiff's case, namely, his claim c for compensation for malicious prosecution, I would at the very outset strongly condemn the satirizing tone of the learned District Judge's criticism of the judgment of the learned Subordinate Judge. The judgment of the learned Subordinate Judge hardly deserved such criticism and, in my opinion, such criticism ill suits the purpose of administration of justice.

To sustain his claim for malicious prosecution the plaintiff has to prove : (1) That there was want of reasonable and probable cause for the prosecution. (2) That the proceedings were initiated in a malicious spirit, i.e., from d an indirect and improper motive and not in furtherance of justice. We may assume in this case that the plaintiff was innocent and that his innocence was pronounced by the tribunal before which the accusation was made. There is again no question that the prosecution which is alleged to have injured the plaintiff was for an offence, a conviction of which would carry reprobation impairing the fair name of the person convicted.

As has been stated above, any one is *prima facie* entitled to set a Court of justice in motion. Prosecuting is not, thus, *prima facie*, a tort and is not a tort in itself. For reasons of public policy the law gives protection to persons prosecuting, even where there is no reasonable and probable cause for the prose-

cution. It is only when the person abuses his privilege for the indulgence of his personal spite that he loses the protection and renders himself liable to action, not for the malice but for the wrong done in subjecting another to annoyance, expenses of a causeless prosecution and possible loss of reputation. Want of reasonable and probable cause and existence of malice must concur in order to constitute this wrong. If there is reasonable and probable cause for the prosecution then, even though the prosecution is started to satisfy a personal grudge and is prompted by malice and the worst of motives the prosecutor will not be liable for an action for malicious prosecution. f The learned District Judge in his case has found that there was reasonable and probable cause for the prosecution. If this finding stands then no other question will arise and the plaintiff's appeal must fail.

Mr. Chakrabarty appearing for the appellant contends and, I must say, rightly contends, that the question whether or not there was a reasonable or probable cause for the prosecution is a question of law to be inferred from certain facts. This contention of Mr. Chakrabarty is amply supported by the highest authorities: see (1905) A. C. 168;⁴ (1938) A. C. 305⁵ at p. 317. It therefore becomes necessary g for us to see on what facts the learned District Judge has based his conclusion as to the existence of reasonable and probable cause in this case. The learned District Judge has found: (1) That on 23rd December, the plaintiff used disgraceful language and indulged in every form of vulgarity of speech when addressing Chand Ali and that such language was sufficient even to lead to bloodshed; (2) That Chand Ali accompanied by the Amin and other persons went to defendant 1's house on the morning of 24th December and made a complaint. It was of course a verbal complaint; (3) That the following statement of h defendant 1 as to what he did on this complaint must be accepted as true:

"Chand Ali made regular complaint to me as Sub-Divisional Magistrate. It was not my duty to record the statement. It was a report which constituted an offence in which I was asked to take action. The Amin and other labourers corroborated the statement of Chand Ali. I took cognizance of the offence then and there. I wanted to enquire into the matter. I took the matter on its face value. I did not like to take any immediate action then. I told that I would not do anything that would antagonise others. I wanted sympathy from all in this great work. I deferred any action then and there. I thought of

4. (1905) 1905 A.C. 168: 74 L. J. P. C. 62: 92 L.T. 483, *Cox v. English, Scottish and Australian Bank*.

5. (1938) 1938 A. C. 305: 107 L. J. K. B. 225: 82 S. J. 192: (1938) 1 All. E. R. 1, *Harminan v. Smith*.

a inquiring about the truth or otherwise of the complaint and to have the matter compromised, if possible. I did not take any action because I did not hear the other party. I thought that I will hear the other side before I take action."

All these are undoubtedly questions of fact and the findings of the learned District Judge in respect of them are the result of his appreciation of the evidence on the record. It is not disputed that there is evidence on the record in support of these findings. As regards the second of the above findings Mr. Chakrabarty refers us to the definition of the word 'complaint' in S. 4 (1) (4), Criminal P. C., which defines the term as

b "the allegation made orally or in writing to a Magistrate with a view to his taking action under this Code that some person . . . has committed an offence," and points out from the evidence of defendants' witness Atul Chandra Som, accepted and relied on by the learned District Judge himself in his judgment, that "Chand Ali said that he was a poor man and so he will not lodge complaint in Court." Mr. Chakrabarty contends that this shows that there could not have been any 'complaint' before the learned Magistrate. The learned District Judge himself pointed out after the above finding that the word complaint there was used not in the sense in which it is used in the Criminal Procedure Code. Assuming that there was no complaint by Chand Ali within the meaning of the definition given in the Code, the second of the above findings will amount to saying that on 24th December, defendant 1 received information from Chand Ali that an offence under S. 504, Penal Code, had been committed by the plaintiff on 23rd December. Mr. Chakrabarty's comment on the 3rd of the above findings is: (1) that the statement as to taking cognizance on the complaint of Chand Ali is inconsistent with what defendant 1 stated in paras. 16 and 24 of his written statement, a (2) that the statement is contradicted by the entry in the order-sheet of the criminal case and (3) that the very statement that defendant 1 was still thinking of settling the matter shows that till then he did not take cognizance of the offence.

The offence complained of or reported, being one under S. 504, Penal Code, was certainly compoundable by the person insulted. I do not see how that statement by defendant 1 detracts from his statement that he took cognizance of the offence then and there. Taking cognizance of an offence is a mental act. The person himself deposes as to the time when he took cognizance of the offence and he is believed by the final Court of fact. It is difficult to see how we can interfere with this

finding. The order sheet in the criminal case does not show that it was only at the jail gate and only after recording the statement of Chand Ali that the Magistrate took cognizance of the offence. Section 190, Criminal P. C., lays down on what materials a Magistrate can take cognizance of an offence and S. 200 of the Code enacts that a Magistrate taking cognizance of an offence on complaint shall at once examine the complainant upon oath and the substance of the examination shall be reduced to writing and shall be signed by the complainant and also by the Magistrate. This may mean that when cognizance is taken on complaint the factum of taking cognizance is not to remain a mere mental act but must consist of the acts prescribed by S. 200. It will not be necessary for me to consider this question in the present case. For our present purposes we are only concerned with seeing whether or not there were materials in existence on which the criminal prosecution that followed as a matter of fact can be said to have been started without any reasonable and probable cause. I shall assume that when a Magistrate takes cognizance of an offence otherwise than on complaint or police report, he starts the prosecution and if he thus takes cognizance without any reasonable and probable cause, and prompted by malice, he renders himself liable to an action for malicious prosecution.

That he took cognizance of the offence is an admitted fact. He says that he took cognizance on the complaint of Chand Ali under S. 190 (1) (a), Criminal P. C. He has been believed by the final Court of fact that he took cognizance of the offence on the spot. Though he characterised the information received from Chand Ali as the complaint made by the latter, this is not a question of fact. He chose to treat that information as 'complaint' but as a matter of fact it was not so. h The fact however still remains that he took cognizance of the offence on the materials received by him from Chand Ali on 24th December. Mr. Chakrabarty contends that the reasonableness of the cause must be judged by the objective test and invites us to hold that judged by this test the materials before defendant 1 did not supply any reasonable and probable cause for the prosecution. Mr. Noad appearing for the respondent contends: (1) That the test of reasonableness must be 'subjective'; reasonable and probable cause means reasonably apparent to and relied on by the prosecutor; (2) (a) That even applying the objective test the above facts as found by the final Court of fact are sufficient to establish

a reasonable and probable cause ; (b) that at any rate the existence of those materials before the defendant at the time when he took action would at least disprove the negative, namely, want of reasonable and probable cause.

I am not sure whether the test "reasonably apparent to and relied on by the prosecutor" would not itself again involve the determination of the question whether a thing is reasonably apparent to the prosecutor when he himself thinks it to be reasonable or whether that reasonableness again should have objective existence. But, in my opinion, the second contention of Mr. Noad must be accepted. On the facts found it is difficult to say that it would have been without any reasonable and probable cause for any Magistrate to take cognizance of the offence and start the prosecution as was done by defendant 1. It may be that defendant 1 was prompted to take immediate action, having been enraged by the alleged effrontery of the plaintiff. It may also be that the subsequent steps taken by the defendant were injudicious. The spectacle of dispassionate justice and of calm adherence to the law of the land never fails to produce its effect on the public mind and is particularly admired in a guardian of law and order who can avoid being driven to action by an effrontery of the present type calculated only to touch one's personal feeling of dignity. No wielder of any public power should regard the enjoyment of that power as an event in itself. At the same time it is difficult to say that there was no reasonable or probable cause for prosecution in this case even judged by the standard of what on similar materials an average prudent man would do.

In the above view no other question really arises for our decision. As the prosecution cannot in this case be said to have been without reasonable and probable cause, malice or no malice, the present action must fail. I, therefore, agree that the appeal must be dismissed with costs.

G.N.

Appeal dismissed.

A. I. R. (31) 1944 Calcutta 13

ROXBURGH J.

Jharuram Das Monda — Plaintiff — Appellant

v.

Hajar Mohammad Sheik Fakir and others—Defendants—Respondents.

Appeal No. 504 of 1940, Decided on 12th January 1943, from appellate decree of Addl. Dist. Judge, Dinajpur, D/- 27th January 1940.

Bengal Tenancy Act (1885 as amended by Act 6 of 1938), Ss. 48 and 47A — Plaintiff held

entitled to claim rent at contracted rate and decision of 1930 was not binding on parties.

The plaintiff had sued in 1939 for rent at Rs. 144 per year. The defendants were able to show that in a previous rent suit (No. 14 of 1930) the plaintiff had claimed at the rate of Rs. 150 per year but had obtained a decree at the rate only of Rs. 38-12-0, the reason for that decision being that the tenancy of the defendants having come into existence prior to the amendment of S. 48, Bengal Tenancy Act, which came into force in 1929, the amended section had no application to the case and accordingly the plaintiff was not entitled to more than 25 per cent. in excess of the amount of Rs. 31 paid by himself as rent to his landlord. Section 47A was inserted in the Bengal Tenancy Act by the Amending Act 6 of 1938 :

Held that the decision in the Rent Suit of 1930 based as it was on a view that the amended S. 48 did not apply to the tenancy in suit was no longer binding between the parties. The plaintiff was therefore entitled to claim the amount contracted for by the defendant, that is to say, Rs. 144. [P 14e]

Jatindra Nath Sanyal and Ranajit Acharya Choudhury — for Appellant.

Syed Nausher Ali, Khandker Mohammad Hosan, Abdul Hakim and Ramendra Mohan Majumdar for Deputy Registrar

— for Respondents.

Judgment.—This appeal arises out of a suit for rent at Rs. 144 per year together with cesses. The suit was decreed by the trial Court at the rate claimed but on appeal the learned Additional District Judge of Dinajpur allowed the plaintiff a decree at the rate of Rs. 38-12-0 per year only plus cess for the three years in suit. The defendants were able to show that in a previous rent suit (No. 14 of 1930) the plaintiff had claimed at the rate of Rs. 150 per year but had obtained a decree at the rate only of Rs. 38-12-0, the reason for that decision being that the tenancy of the defendants having come into existence prior to the amendment of S. 48, Bengal Tenancy Act, which came into force in 1929, the amended section had no application to the case and accordingly the plaintiff is not entitled to more than 25 per cent. in excess of the amount of Rs. 31 paid by himself as rent to his landlord. Subsequent to this decree the plaintiff brought two other suits, No. 27 of 1933 and No. 3569 of 1934, claiming rent at the rate of Rs. 38-12-0. The substantial point in issue therefore before the lower Courts was whether the previous decree in 1930 operated as res judicata. It was conceded that by subsequent decisions of this Court it had been held that the amended S. 48 would apply even to tenancies created before it came into force. The trial Court took one view while the lower appellate Court took the view detrimental to the plaintiff's case, namely, that the previous decree did in fact operate as res judicata.

In this Court the point was at first pressed in this form and various arguments were put forward in order to distinguish the case in

a some way from the decision of Rankin C. J., in the Full Bench case in 56 Cal. 723.¹ In that case a distinction was made between the case in which a previous decision had been shown to be erroneous as a result of later decisions of the superior Court and the case in which there had been a change in law made by the Legislature. The judgment of Maclean C. J., in 32 Cal. 749,² in which the learned Chief Justice had held that there was no difference between the two cases was discussed and dissented from. In the course of argument in this Court attention of the parties was drawn to S. 47A which was inserted in the Bengal Tenancy Act by b the Amending Act, namely, Act 6 of 1938. The terms of the section are :

"The provisions of this chapter shall apply to all under-raiyats whether their tenancies were created before or after the commencement of the Bengal Tenancy (Amendment) Act, 1928."

The effect is that the decision in 56 Cal. 723¹ changes from the position of being used by the respondents in support of their contentions and becomes one which supports the case of the plaintiff. The change in law from that under which the case of 1930 was decided has been made by the Legislature subsequent to that case. Mr. Nausher Ali appearing on behalf of the respondents has suggested with some ingenuity that in fact there has been no change c in the law brought about by the amended section which merely confirms the view finally taken by this Court in various decisions on the question as to the applicability of S. 48, Ben. Ten. Act, to tenancies created prior to the amendment. A reference to the cases cited in the Bengal Tenancy Act by Mr. A. C. Ghose, 3rd Edn., shows that for some time there was some divergence of opinion in this Court with regard to this very question and indeed the matter must necessarily have been one giving rise to some doubts in view of the special wording to be found in S. 48 which prima facie d seems more suited as referring to cases only in which the under-raiyati in question is created after that section came into force, for the phrase used is "when an under-raiyat is admitted to the occupation of land." Moreover, it is evident that the Legislature thought that there was some need to clear up the law on the question of retrospective effect of the amendments in Chap. 7. In my opinion, even apart from the fact that there was some divergence of opinion in this Court, there has definitely been a change in the law as it stood on

the statute book at the time when the case of 1930 was decided and as it stands now, for the words of S. 47A have been added to the statute book. In my opinion, that is sufficient to attract the principle referred to in 56 Cal. 723¹ that has been well-established, and the result is that the decision in the rent suit of 1930 based as it was on a view that the amended S. 48 did not apply to the tenancy in suit is no longer binding between the parties. Once the decision of 1930 is removed, there can be no doubt as to what the plaintiff is entitled, namely he is entitled to claim the amount contracted for by the defendants, that is to say, Rs. 144.

f Mr. Nausher Ali has urged on behalf of the respondents in the case to send the case back for disposal by the lower Court and that he should be allowed to raise the defence that the rent should be diminished on the ground that the defendants had been dispossessed from some portion of the land. In support of this he refers to the judgment in the previous suit of 1930 where this defence was taken and it was explicitly stated that the point was left open. The point was not taken in the present suit in the written statement at all although the plaintiff claimed for the full amount according to the contract. Again, it was not g taken in the grounds of appeal although the plaintiff succeeded in his claim. I do not think the respondents can now be allowed to raise this defence. The result is that the appeal is allowed, and the decree of the lower appellate Court is set aside and the decree of trial Court is restored. There will be no order as to costs in this appeal, or in the lower appellate Court.

R.K.

Appeal allowed.

A. I. R. (31) 1944 Calcutta 14

MUKHERJEA AND BLANK JJ.

Satinath Bagchi — Appellant

v.

Raja Bhupendra Narayan Sinha Bahadur — Respondent.

Appeal No. 200 of 1941 and Appln. No. 20 of 1942, Decided on 8th January 1943, from original orders of Sub-Judge, Birbhum at Suri, D/- 10th May 1941 and 1st December 1941, respectively.

(a) Bengal Money-Lenders Act (10 of 1940), S. 36 — Re-opening of decree rejected — No appeal lies.

An order rejecting an application for re-opening of a decree under S. 36 is not appealable. [P 15e]

C. P. C. —

(40) Chitaley, S. 96 N. 2 Pt. 3.

(41) Mulla, Page 353 Pt. (f).

(b) Bengal Money-Lenders Act (10 of 1940), S. 2 (12)—Loan—Debt not originally loan may become loan — Putni rent held did not become loan by putnidar agreeing to pay interest.

1. ('28) 15 A. I. R. 1928 Cal. 777: 115 I. C. 593: 56 Cal. 723: 48 C. L. J. 327: 33 C. W. N. 126 (F.B.), Tarini Charan v. Kedarnath.

2. ('05) 32 Cal. 749: 1 C. L. J. 176: 9 C. W. N. 466, Alimunnissa Chowdhurani v. Shama Charan Roy.

a Even when a debt does not originally come within the definition of loan as given in the Bengal Money-Lenders Act yet if a bond or security is subsequently taken in respect of it it may under certain circumstances amount to a loan : ('41) 28 A.I.R. 1941 Cal. 689 and ('43) 30 A. I. R. 1943 Cal. 108, *Rel. on.*

[P 16a]

To constitute a loan there must be an element of advance either actual or notional and in each case the Court has got to be satisfied from the circumstances that the transaction in fact involved an advance.

[P 16a]

b Proceedings were started against the putnidars under Regn. 8 of 1819. The putnidars paid part of this rent to the zamindars and agreed to pay the balance after some months with interest at Re. 1-8-0 per cent. per month. There was no bond or security taken in respect of the rents due and no new obligation was created in substitution of the old :

Held that the mere fact that there was an undertaking to pay interest at the rate of Re. 1-8-0 did not affect the situation. By itself it did not show that it was treated as a loan. The putnidars were given further time to pay the rent and there was nothing unnatural that the putnidars agreed to pay rent slightly in excess of what they were bound to pay under law. The liability of the putnidars for the putni rent could not therefore amount to a loan within the meaning of the Bengal Money-Lenders Act.

[P 16b,c]

(c) Civil P. C. (1908), O. 21, R. 64 — Attachment.

Unless attachment is effected in fact a statement by the parties that the property remains attached does not serve the purpose of law at all. [P 16g]

c C. P. C. —

('40) Chitaley, O. 21 R. 64 N. 4 Pt. 1.

('41) Mulla, Page 854 Note "Omission . . . sale."

(d) Civil P. C. (1908), O. 21, R. 90—Property not attached — Objection raised by judgment-debtors to valuation in proclamation on notice under O. 21, R. 66 — Sale held before decision of objection—Purchaser decree-holder himself — Sale was set aside.

a The property sold in execution was not in fact attached. On a notice under O. 21, R. 66, objection was raised by the judgment-debtors that the valuation of the properties as given in the sale proclamation was grossly inadequate. The petition of objection set out the details of valuation with regard to each item of property and the property was valued by them at not less than Rs. 60,000. On this petition a miscellaneous case was started; strangely, however, before this miscellaneous case was disposed of, the sale was held and the properties were knocked down for Rs. 1900 only. There were certain rent charges upon these properties and there was rent due by the darputnidars to the putnidars for a period of about four years. This however was not set out in the sale proclamation :

Held that as the rent charges were not set out in the sale proclamation it could not be said that the intending purchasers were scared away in any way by the description of the properties as given in the sale proclamation. There was no other bidder except the decree-holder and in the circumstances the sale was liable to be set aside.

[P 17c]

Dr. S. C. Basak, Jatindra Mohan Chowdhury and Amarendra Narayan Bagchi —

for Appellant.

Sitaram Banerji and Arun Kumar Dutta —

for Respondent.

Judgment (*F. M. A. No. 200 of 1941 with application*).—This appeal is directed against an order of the Subordinate Judge of Birbhum dated 10th May 1941, rejecting an application of the appellant for re-opening of a decree under S. 36, Bengal Money-Lenders Act. It is conceded on behalf of the appellant that the appeal itself is incompetent but there is an application in the alternative under S. 115, Civil P. C., and we are asked to exercise our powers in revision under that section. The appellant is the common manager of the Bagchis of Jamshepur who were putnidars under the respondent the Raja of Nashipur. The putni rent for the year 1341 B. S. being in arrears, the respondent started proceedings under Regn. 8 of 1819 on 1st Baisakh 1342 corresponding to 15th April 1935. The claim for putni rent was laid at Rs. 27,698 annas odd. On 15th May 1935, a petition was filed by the common manager of the putnidars before the Collector stating that he had paid Rs. 1821 annas odd to the zamindar in part payment of the rent due and on his request the latter agreed to strike out the Austum proceedings. He acknowledged the liability of the putnidars to pay the balance of the putni rent amounting to Rs. 25,874-10-1 and promised to pay that amount within the month of Sraban 1342 with interest at Re. 1-8-0 per cent. per month upon the loan. As a matter of fact no money was paid and the putni itself was sold under Regn. 8 of 1819 for arrears of a subsequent period. On 15th May 1937, the Raja of Nashipur instituted a money suit against the putnidars for recovery of the amount mentioned aforesaid and a decree was obtained on compromise on 20th February 1939. It is this decree which is sought to be re-opened by the judgment-debtor under S. 36, Bengal Money-Lenders Act.

The only question in controversy is whether the decree was in respect of a loan which could attract the operation of the provisions of the Bengal Money-Lenders Act. Dr. Basak for the appellant has conceded that rent due by a putnidar to a zamindar could not come within the definition of loan as contained in S. 2 (12), Bengal Money-Lenders Act, even though it carried interest either under the statute or under an agreement between the parties. His contention however is that in this case it became a loan by reason of subsequent agreement between the parties which was evidenced by the petition filed before the Collector on 15th May 1938. In this petition, as I have said already, the putnidar promised to pay interest in excess of what was payable under law. We do not think that we can ac-

a. cept this contention as sound. It may be conceded that even when a debt does not originally come within the definition of loan as given in the Bengal Money Lenders Act yet if a bond or security is subsequently taken in respect of it it may under certain circumstances amount to a loan. This proposition was laid down in 45 C. W. N. 1122¹ and was approved of later by another Division Bench of this Court in 47 C. W. N. 52.² To constitute a loan there must be an element of advance either actual or notional and in each case we have got to be satisfied from the circumstances that the transaction in fact involved an advance.

b. The circumstances of this case, however, show conclusively that there was no idea of any advance. There was no bond or security taken in respect of the rents due and it is not that a new obligation was created in substitution of the old. The liability still remains a liability for rent and we are unable to hold that the landlord gave up his rights under the law in return for a personal undertaking given by the common manager of the putnidars. The fact that there was an undertaking to pay interest at the rate of Re. 1-8-0 does not in our opinion really affect the situation. By itself it does not show that it was treated as a loan. Apparently the landlord had to incur certain expenses in connexion with the Austum proceedings and the putnidars were given further time to pay the rent. In these circumstances there is nothing unnatural that the putnidars agreed to pay rent slightly in excess of what they were bound to pay under law.

c. On a consideration of these facts and circumstances, we are of opinion that the Court below was right in the view that the liability of the putnidars for the putni rent could not amount to a loan within the meaning of the Bengal Money-Lenders Act and consequently the application under S. 36 was rightly dismissed. The application therefore must be discharged. The result is that the appeal and the application are dismissed. There will be no order for costs either in the appeal or in the application.

d. *F. M. A. No. 20 of 1942*—This appeal is on behalf of the judgment-debtor and it arises out of a proceeding to set aside an execution sale under O. 21, R. 90, Civil P. C. The suit brought by the respondent was for recovery of putni rent due in respect of putni held by the judgment-debtor under him and as the putni was

already sold under Regn. 8 of 1819 at the date of the institution of the suit it was registered in the money file. A decree was obtained on the basis of a compromise dated 20th February 1939. The decree-holder put the decree into execution in Money Execution Case No. 35 of 1940 and on 30th September 1940, the properties in dispute comprised in six lots were sold. They were purchased by the decree-holder himself for sums aggregating to Rs. 1900. On 5th November 1940, an application was presented by the common manager of the judgment-debtors under O. 21, R. 90, Civil P. C., attacking the sale on various grounds of irregularity which were said to result in substantial loss to the petitioners. The Subordinate Judge by his order dated 1st December 1941, dismissed this application and it is against this order that the present appeal has been filed.

On hearing the learned advocates on both sides it appears to us that there were certain irregularities in connexion with publishing and conducting the sale. To begin with the properties were not attached at all before they were put up for sale. The decree-holder relied for this purpose upon a statement in the compromise petition upon which the decree was based that the properties would be regarded as under attachment on the basis of the sole-nama. It goes without saying that unless attachment is effected in fact a statement by the parties that the property remains attached does not serve the purpose of law at all. In the second place another irregularity in the procedure appears on the face of the record. On 24th June 1940, notice was issued by the Court under O. 21, R. 66, Civil P. C., fixing 13th July following for return and order. On 13th July the then common manager of the judgment-debtors did put in a petition of objection stating inter alia that the valuation of the properties as given in the sale proclamation was grossly inadequate. The petition of objection set out the details of valuation with regard to each item of property and the case of the petitioner was that at the lowest computation the properties could not be valued at less than Rs. 60,000. On this petition a miscellaneous case being case No. 62 of 1940 was started; strangely however before this miscellaneous case was disposed of, the sale was held and the properties were knocked down for Rs. 1900 only. It is stated by Mr. Banerji who appears for the respondent that the common manager who filed the petition for objection on 13th July 1940 was subsequently discharged and another common manager was appointed and it may be that the subsequent manager did

1. ('41) 28 A.I.R. 1941 Cal. 689 : 198 I. C. 303 : 74 C. L. J. 379; 45 C. W. N. 1122, Kunja Behari Pal v. Satyendra Nath Das.

2. ('43) 30 A.I.R. 1943 Cal. 108; 76 C. L. J. 49: 47 C. W. N. 52, Fateh Chand Mahesri v. Akimuddin Chowdhury.

a not proceed with the application. We do not find however that the application was dismissed for non-prosecution. The miscellaneous case remained on the file and was not disposed of till long after the sale was held.

The question for our consideration is whether by reason of these irregularities the properties were sold at an inadequate price. The evidence on this point seems to us to be clearly one-sided. The annual net profits of the properties which are darpatni tenures created under the putnidars held by the judgment-debtors under the Raja of Nashipur were, according to their evidence, in the neighbourhood of Rs. 4000 and taking the price to be 15 times the net profit it was contended that the valuation of these properties would be Rs. 60,000. It is true that there were certain rent charges upon these properties and there was rent due by the darputnidars to the putnidars for a period of about four years. This, however, was not set out in the sale proclamation and it appears that the subsequent purchaser of the putni has instituted a suit against the darputnidar claiming a large sum of money. The judgment-debtors have put in their defence in that suit and it is still debatable as to how much was actually due as rent. We do not think that in the circumstances the sum of Rs. 1900 which the properties actually fetched was an adequate price. As a matter of fact, when the rent charges were not set out in the sale proclamation it could not be said that the intending purchasers were scared away in any way by the description of the properties as given in the sale proclamation. There was no other bidder except the decree-holder and in the circumstances we are of the opinion that the sale is liable to be set aside.

The result is that we allow this appeal and set aside the order of the Subordinate Judge. It is perfectly true that the judgment-debtors had been adopting dilatory tactics throughout and they were trying to put off payment of their just dues on one pretext or other. Their conduct does not seem to us in any way to be proper but nevertheless we cannot shut our eyes to the irregularities which appear clear on the face of the record. The result is that we set aside the sale and we direct that the records may be sent down immediately with a direction that the executing Court will take up the matter with as much expedition as possible and put up the properties to sale as quickly as possible. There will be no order as to costs in this appeal. We are informed that the Subordinate Judge who is at present at Suri happens to be a relation of some of the

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judgment-debtors. In these circumstances we direct that the records of this case be sent to the District Judge of Birbhum with a direction that the sale be held by him as early as possible.

R.K.

Order accordingly.

* * A. I. R. (31) 1944 Calcutta 17

FULL BENCH

KHUNDKAR, LODGE, SEN, ROXBURGH
AND AKRAM JJ.

Mahabir Singh and another — Appellants

v.
Emperor.

Full Bench Reference No. 1, Appeals Nos. 96 and 100 and Revn. Case No. 217 of 1943, Decided on 25th August 1943.

(a) Criminal P. C. (1898), S. 435—Purpose of calling for record explained (Per *Khundkar J.*).

The record is not to be called for merely to satisfy the Court's curiosity, but it is to be called for in order that the Court may, after examination, take measures to correct by revision what may be incorrect, illegal or improper in some thing or things which the record contains or discloses. The operation of revising calls for the exercise of powers. [P 20c,d]

Cr. P. C. —

('41) Chitale, S. 435, N. 1.

('41) Mitra, Page 1378.

(b) Criminal P. C. (1898), Ss. 435 and 439 — "Finding," "sentence" "order" and "proceedings" explained — Scope of revision is wider than appeal—Scope of revision enunciated (Per *Khundkar J.*).

In S. 435 "finding" includes a conviction or an acquittal. The word "sentence" means a direction by which a punishment is prescribed and meted out to a person who has been convicted of an offence. "Order" covers commands or directions that something shall be done discontinued or suffered, but it does not include "sentence" and "finding." The word "proceeding" is wider than the expression "judicial proceedings," and covers everything done and recorded by an inferior criminal Court acting as a Court. But it means everything of this kind which is not a finding, sentence or order. The words "finding" "sentence" "order" "proceeding" cover everything which may be remedied in revision. No part of the subject-matter of revision falls outside these words. There is nothing capable of revision which is not either a finding; or a sentence, or an order, or a proceeding. The words, taken together, are coterminous with the things which revision may reach. That is the scope of revision in so far as its subject-matter is concerned. No appeal will lie from mere findings which are not convictions or acquittals, or from any proceedings which are not convictions, acquittals, sentences, orders or mere findings. Now, inasmuch as proceedings in this sense, and mere findings, and convictions sentences and orders from which no appeal lies to the High Court are capable of revision by the High Court, the subject-matter of revision is wider than the subject-matter of appeal. [P 20e,f,g,h; P 21a]

Cr. P. C. —

('41) Chitale, S. 435, N. 12 and S. 439, N. 1.

('41) Mitra, Pages 1383 and 1421.

* * (c) Criminal P. C. (1898), Ss. 435 and 439 — Death sentence proper but only transportation awarded—Rule enhancing sentence issued — High Court will have powers in revision which it would have on reference under S. 374 (Per *Majority of Full Bench; Khundkar and Sen JJ., Dissenting.*).

(Per *Majority of Full Bench*)—There is nothing in the language of S. 439 (6) to suggest that the powers of a Court of revision, dealing with a rule for enhancement, are wider than the powers conferred by S. 423 on a Court of appeal : ('34) 21 A.I.R. 1934 Cal. 105; 62 Cal. 952 ; 43 C. W. N. 1032 ; ('39) 26 A. I. R. 1939 Cal. 497 ; ('26) 13 A. I. R. 1926 Bom. 555 ; ('40) 27 A. I. R. 1940 Bom. 279 ; ('36) 23 A. I. R. 1936 Mad. 516 ; ('36) 23 A. I. R. 1936 All. 850 ; ('32) 19 A. I. R. 1932 Pat. 126 and ('29) 16 A. I. R. 1929 Lah. 797, *Rel. on.* [P 32a]

In cases where the death sentence is not involved the Court of revision is not authorised to alter or reverse the verdict of a jury unless it is of opinion that such verdict is erroneous owing to a misdirection by Judge or to a misunderstanding on the part of the jury of the law as laid down by him. But in cases where the death sentence is the proper sentence if the accused is guilty, the Court of revision, on a rule to enhance the sentence, has all the powers that it would have if the appropriate sentence had been passed by the Sessions Court and a reference made under section 374. [P 33f,g]

(Per *Khundkar J.*)—The words "the correctness, legality or propriety of any finding sentence or order" and the words "the regularity of any proceedings" in S. 435, and the words "may in its discretion exercise," in S. 439 do not throw the door open for the exercise of any power or jurisdiction, but generally speaking, only of such as have received recognition in practice. In regard to the final finding in a jury trial the High Court will convert itself into a Court of appeal, and look at the question only as a Court of appeal must, subject to the express words of S. 439. In so doing, the High Court will exercise the powers given to a Court of appeal by S. 423 and expressly by S. 439, and those only and will not exercise powers which are merely implied by Ss. 435 and 439. In a case in which an accused person has been called upon to show cause why his sentence should not be enhanced to a capital sentence in accordance with the procedure laid down in S. 439 such person has not the right to contend that the verdict of the jury was based upon an erroneous view of the evidence and the facts of the case. [P 23d; P 24e; P 30f]

(Per *Sen J.*) — The High Court, dealing with a cause shown under S. 439 (6) against a conviction, has the power to go into facts in every case whether tried by jury or not, and to set aside the verdict of a jury on the ground that the appreciation of the evidence by the jury is wrong. It will, of course, give due weight to the opinion of the jury regarding the facts, but after doing so, it has the power to set aside the verdict if it is of opinion that the verdict cannot be supported on the facts. The powers of the revisional Court are therefore not bound by S. 439 (1). That section merely empowers the revisional Court to pass at its discretion any of the orders which an appellate Court may pass under the sections mentioned therein. It does not limit the powers of the High Court to the passing of those orders only; nor does it limit the scope of the Court's investigation. The powers of the revisional Court are to be ascertained by reading S. 435 together with S. 439. Section 435 expressly says that the Court

may send for any record of an inferior Court" to satisfy itself as to the correctness, legality and propriety of a finding, sentence or order or the regularity of a proceeding. The matters enumerated in S. 435 which this Court may investigate necessarily include matters of fact and there is no section corresponding to S. 418 limiting the scope of this investigation regarding cases tried by jury to points of law only. Hence the High Court, on revision may set aside the verdict of a jury on the ground that it is wrong on the facts, even though the erroneous verdict is not due to any misdirection by the Judge or misunderstanding by the jury of the law as laid down by the Judge and although there is no other error of law. There is nothing in S. 439 (1) which limits the High Court's powers in revision to those exercisable in appeal. When a person convicted of murder and sentenced to transportation for life shows cause against his conviction by taking advantage of the provisions of S. 439 (6) he may demand that the verdict of the jury be altered, reversed or set aside on the ground that it is wrong on facts even though there has been no misdirection by the Judge or misunderstanding by the jury of the law as laid down by the Judge or any other error of law. A convicted person would have this right not only in cases of murder but in every case. [P 35b,c; P 36h; P 37a,b; P 38b,c; P 39b]

Cr. P. C. —

('41) Chitaley, S. 439, N. 34.

('41) Mitra, Page 1451.

(d) Interpretation of Statutes — Intention of Legislature (Per *Khundkar J.*).

The intention of the Legislature is not to be speculated upon : (1897) A. C. 22, *Ref.* [P 29c]

(e) Interpretation of Statutes—Duty of Court (Per *Khundkar J.*).

It is not for the Court to supply a *casus omissus* : (1846) 6 Moo. P. C. 9, *Rel. on.* [P 29g]

(f) Interpretation of Statutes—Intention (Per *Sen J.*).

The Courts are to gather the intention of a statute by giving the words used their ordinary meaning. They are not to speculate regarding the motives of the Legislature. [P 38h]

S. C. Talukdar, Purnendu Sekhar Bose and Nitya Ranjan Biswas (in 96) and Salil Kumar Hazra (in 100) — for Appellant.

Holiram Deka — for Accused.

D. N. Bhattacharyya and Serajuddin Ahmed — for the Crown.

Khundkar J. — The facts giving rise to this reference are briefly these : On 12th March 1942, a dacoity was committed in a kacheri at Kolai Kunda near Kharagpur, in the course of which three of the inmates of the kacheri were killed. After the usual police investigation, eight persons were placed on trial. Charges under Ss. 396 and 395, Penal Code, read with S. 120B, Penal Code, were framed against Chorobey Kurmi, Kedar Maharaj, Hirga, Jaymull Singh, Mahabir Singh, Arjun Singh and Rajnarayan Sukul; and a charge under S. 412, Penal Code, was framed against Kausalya Bai. The accused were tried by the Additional Sessions Judge of Midnapore and a jury of seven. The jury returned a unanimous verdict in respect of accused Jaymull

a and of accused Kausalya Bai finding them both not guilty of the charges framed against them. By a majority of 5 to 2, the jury found the remaining six accused persons guilty under S. 396, Penal Code, and also under S. 120B/395, Penal Code. The learned Additional Sessions Judge acquitted Jaymull and Kausalya Bai, he convicted the remaining six accused and sentenced them each to undergo eight years' rigorous imprisonment under section 396, Penal Code, observing

b "although a most dastardly crime was committed, the murders committed during the commission of the dacoity, could not specifically be fixed upon any of these accused. In the circumstances, it would not be proper to inflict the extreme penalty of law, nor the maximum sentence of imprisonment in this case."

No separate sentence was imposed under S. 120B/395, Penal Code. Two of the accused persons, namely, Mahabir Singh and Rajnarayan Sukul, appealed against the convictions and sentences. Their applications for admission of appeal were heard by a Division Bench on 9th March 1943. The Division Bench ordered that the appeal be heard and further directed that a rule be issued on the two appellants and also upon the four accused persons, who had not appealed, to show cause why their sentences should not be enhanced. The appeal of Mahabir Singh, being Appeal No. 96 of 1943, and the appeal of Rajnarayan Sukul, being Appeal No. 100 of 1943, and the rule, being Revision No. 217 of 1943, came up for hearing on 20th May 1943. At the time of hearing, it was contended that under the provisions of S. 439 (6), Criminal P. C., the accused persons were entitled to shew that the evidence on record was not such as to justify their conviction.

The attention of the Court was drawn to the decisions in 61 Cal. 6¹ and in 62 Cal. 952,² wherein it was held that when a rule for enhancement of sentence is issued on an accused person who has been convicted in a trial by jury,

a "the convicted person has only the same right as regards challenging the actual conviction as he would have had if he had come before the Court by way of a regular appeal preferred by himself or by proceedings in revision instituted by himself," and to certain observations of Henderson J. in 43 C. W. N. 1032³ and of the same learned Judge in 40 Cr. L. J. 877.⁴ The learned Judges were of opinion that the above mentioned

cases were wrongly decided, and they submitted the following question for the decision of a Full Bench, viz.:

"In a case such as that with which we are now dealing in which an accused person has been called upon to shew cause why his sentence should not be enhanced to a capital sentence, in accordance with the procedure laid down in S. 439, Criminal P. C., has such a person a right to contend that the verdict of the jury was based upon an erroneous view of the evidence and the facts of the case?"

The argument advanced on behalf of the accused upon whom these rules were issued, is in two compartments. It is argued, in the first place, that whenever the High Court, in the exercise of revision, issues a rule for the enhancement of a sentence, the person affected has the right to challenge his conviction upon the evidence, even when the trial was held with a jury. Next it is contended, that if, in the case of persons who have been convicted in a jury trial, the ordinary rule is that such persons may not challenge the verdict upon any ground of fact, an exception must be made in the case of those who are called upon to show cause why the sentences passed on them should not be enhanced to the death penalty. The contention contained in the second compartment of this argument would call for consideration only if the contention embraced in the first compartment failed. In developing the first contention, Mr. Taluqdar urged that S. 439 (1) must be read with S. 435, and also that the language of the latter section and of S. 439 (6) is wide enough to include the power to interfere with the verdict of a jury on the facts. Section 439 (6) is in these terms :

"Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-s. (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction."

Section 439 (6) is silent regarding the question whether a person showing cause against his conviction under that sub-section, can ask the Court to go into the facts in cases in which the conviction was in a jury trial. It is conceded that a person showing cause against his conviction in an appeal cannot ask the Court to go into the facts when the conviction was in such a trial. This limitation upon an accused person's rights, and upon the Court's power in appeal is contained in general terms in S. 418 (1) and more specifically in S. 423 (2), Criminal P. C. They are as follows :

Section 418 (1) "An appeal may lie on a matter of fact as well as a matter of law, except where the trial was by jury, in which case the appeal shall lie on a matter of law only."

Section 423 (2) "Nothing herein contained shall authorise the Court to alter or reverse the verdict of a

1. ('34) 21 A. I. R. 1934 Cal. 105 : 147 I. C. 1124 : 35 Cr. L. J. 554 : 61 Cal. 6 : 37 C. W. N. 1122, *Khoda Bux Haji v. Emperor*.

2. ('35) 62 Cal. 952, *Alef Shaikh v. Emperor*.

3. ('39) 43 C. W. N. 1032, *Fazarali v. Emperor*.

4. ('39) 26 A. I. R. 1939 Cal. 497 : 184 I. C. 206 : 40 Cr. L. J. 877, *Moseladdi v. Emperor*.

a jury unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him."

Section 439 which deals with the High Courts' powers in revision, provides in sub-s. (1) that "the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by Ss. 423, 426, 427 and 428 or on a Court by S. 338, and may enhance the sentence."

b Not only appellate powers, but limitations on appellate powers are thus imported into the domain of revision. But the section leaves it to the discretion of the High Court to employ its appellate powers when exercising revisional jurisdiction, and the argument is that the scope of the High Court's jurisdiction in revision is wider than its jurisdiction in appeal. This argument when examined reduces itself to two propositions; firstly, that the subject-matter of revision is more extensive, or in other words that the matters which revision can reach are more numerous than matters which are appealable; and secondly, that the powers of the High Court in revision are more comprehensive than its appellate powers. Both these propositions call for close examination.

c As regards the subjects which are capable of revision: We find the first mention of such subjects in S. 435 in which the material words are:

"The High Court may call for and examine the record of any proceeding for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings..."

d Now the record may be called up for this purpose, viz., that the Court may satisfy itself, as to the correctness, legality or propriety of some thing or things. Obviously, the record is not to be called for merely to satisfy the Court's curiosity, but it is to be called for in order that the Court may, after examination, take measures to correct by revision what may be incorrect, illegal or improper in some thing or things which the record contains or discloses. The operation of revising calls for the exercise of powers. What those powers may be will be considered when the second proposition is examined. At the present moment, let us ponder the subjects which, under this section, may arise for revision. The section says that those subjects are any finding, sentence or order and also proceedings. These are distinct words. The content of each is separate from the content of every other of them. What does each of them include? The word "finding" need not detain us. It has a universally accepted meaning—a finding of law can mean only a conclusion on a question of law by a Judge, a finding of fact means a conclusion on a question of fact by a

Judge or by a jury. In my opinion "finding" here includes a conviction or an acquittal. The word "sentence" is equally simple; it means a direction by which a punishment is prescribed and meted out to a person who has been convicted of an offence. What now is an "order"? Clearly it is a command or a direction by a Court that something shall be done, discontinued or suffered. Conviction and acquittal are sometimes spoken of as orders, but strictly speaking, convictions and acquittals are really finding (I shall use the expression "final findings" to include convictions and acquittals). It follows that "order" covers commands or directions that something shall be done discontinued or suffered, but it does not include "sentence" and "finding." The word "proceeding" is not easy to define except by reference to everything which its denotation covers. We must begin by excluding "finding," "sentence" and "order." The word "proceedings" is obviously wider than the expression "judicial proceeding," and that expression is defined in S. 4 of the Code as something which "includes any proceedings in the course of which evidence is or may be legally taken on oath." "Proceedings" can refer only to the proceedings of the inferior Court whose record has been brought up. The expression therefore covers everything done and recorded by an inferior criminal Court acting as a Court. But it means everything of this kind which is not a finding, sentence or order. Some of the things which may be remedied by revision are well known. They include, to mention a few, orders of dismissal and discharge, refusal to commit for trial, refusal to stay proceedings, refusal to quash proceedings, orders under S. 145, Criminal P. C. These matters all answer the definition of "order" just given. But there are proceedings in relation to which the High Court may exercise its revisional power where it cannot be said that it is necessarily reversing any order. To take a few instances: The High Court can tender a pardon, or order a pardon to be tendered; it can issue a warrant for the arrest of, and commit to prison, or admit to bail an accused person who has been acquitted.

I am of the opinion that the words 'finding,' 'sentence,' 'order,' 'proceedings' cover everything which may be remedied in revision. No part of the subject-matter of revision falls outside these words. There is nothing capable of revision which is not either a finding; or a sentence, or an order, or a proceeding. The words, taken together, are coterminous with the things which revision may reach. That therefore is the scope of revision in so far as

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a its subject-matter is concerned. What now is the scope of appeal in so far as its subject-matter is concerned? Mention of appealable subjects is to be found in more than one section. Appealable subjects are: (1) Orders rejecting applications for restoration of attached property (S. 405); Orders under S. 118 (S. 406); Orders refusing to accept or rejecting a surety under S. 122 (S. 406A); convictions and sentences passed by Magistrates of the second class—the appeal lying to the District Magistrate—(S. 407); convictions and sentences passed by Magistrates of the first class and by Assistant Sessions Judges—the appeal b lying to the Court of Session—(S. 408); convictions and sentences passed by Courts of Session (S. 410); convictions and sentences passed by Presidency Magistrates (S. 411); acquittals (S. 417).

By reason of S. 404, no appeal under the Code can ever lie from anything not mentioned in the sections indicated above or some other law for the time being in force. Now everything mentioned in those sections is either a conviction or a sentence or an acquittal or an order, and no appeal will lie from these except to the respective Courts mentioned in those sections. It follows that no appeal will c lie from mere findings which are not convictions or acquittals, or from any proceedings which are not convictions, acquittals, sentences, orders or mere findings. Now, inasmuch as proceedings in this sense, and mere findings, and convictions, sentences and orders from which no appeal lies to the High Court are capable of revision by the High Court, the subject-matter of revision is wider than the subject-matter of appeal. Let me repeat and emphasise the subject-matter of revision which is outside the scope of appeal. That subject-matter comprises—convictions, sentences and orders, appeals from which cannot be enter- d tained by the High Court, and also mere findings, which are not convictions or acquittals, and also proceedings other than convictions, sentences, orders and mere findings. Bearing this in mind, let us examine the second of our two propositions which was that the powers with which this Court is armed in revision are wider than its appellate powers. Let us consider first what powers this Court has in appeal. The sections in which appellate powers are set out are the following:

Section 421 which enacts a power to summarily dismiss any appeal. Section 423 provides many powers. They are as follows: Sub-s. (1)—Dismissal of any appeal after hearing. Sub-s. (1) (a)—In appeals against acquittal the reversal of the acquittal: the ordering of

a further inquiry, a retrial or a committal, e conviction and sentence; (b) In appeals against conviction: the reversal of the finding of conviction, the altering of the finding of conviction, the reversal of the sentence, the bringing in of a finding of acquittal, the ordering of a discharge, the ordering of a retrial, or of a committal, the reduction of sentence, the alteration of a sentence to one of another kind, (the enhancement of sentence is a matter which is expressly excluded from the purview of ap- pellate powers); (c) the reversal or alteration of any other appealable order; (d) the making of consequential and incidental orders, and f the making of amendments. I shall return to clause (d) presently. Section 418 (1) expressly bars any appeal on fact when the trial was by jury. Section 423 (2) expressly lays down one application of the rule contained in S. 418 (1) by enacting that the Court has no power to alter or reverse the verdict of a jury except for an error of law of a particular kind i.e., a misdirection by the Judge, or a misunderstanding on the part of the jury of the law as laid down by the Judge such as to have occasioned an erroneous verdict. But clearly this provision is controlled by S. 418 (1), for it is beyond dispute that there are errors of law of another kind which would, g when committed by the Court below, also entitle the High Court in appeal to set aside the verdict, e.g., omission to cross-examine a witness or omission to examine an accused person under S. 342, Criminal P. C., or material error in the charge framed.

Before leaving these two provisions, I would stress one important fact, and that is that each of these two provisions places a limitation on the Courts' powers, and it is idle to say that S. 423 (2) enacts no such limitation that being already contained by implication in the wider language of S. 418 (1). There can be no doubt h whatever that when powers conferred on a Court of appeal by S. 423 are spoken of, as they are in S. 439 (1), they mean powers subject to the limitation specifically mentioned in S. 423 (2), and can never include a power to reverse the verdict of a jury upon the evidence. Clauses (a), (b) and (c) of sub-s. (1) of S. 423 are very clear, but let us examine cl. (d). Consequential and incidental orders must mean orders which are consequential on, or incidental to, anything done or directed by the Court in an appeal and in the exercise of the powers already set out in cls. (a), (b) and (c) of sub-s. (1) of S. 423. I do not think that the words "consequential" and "incidental" add anything to the Courts' appellate powers. They merely give express recognition to what may be re-

a garded as subsidiary powers already contained by implication in the powers referred to in cls. (a), (b) and (c). But what is meant by the expression "make any amendment"? Does it mean an amendment of anything appearing in or from a record of a lower Court which is under examination, or does it mean an amendment of something the Court of appeal has itself done under the powers contained in cls. (a), (b) and (c)? The word "amendment" is very wide, and if it is to include amendments of things done by the lower Court, then the power to "make any amendment" involves a repetition of some of the powers already provided by clauses (a), (b) and (c). The words "amendment" "consequential" or "incidental order" appear to be ejusdem generis. If so "amendment" means, generally speaking, an amendment of an order or direction of the appellate Court. It does not entitle the appellate Court to alter everything which the record reveals the lower Court to have done or omitted. Suppose the trial Court has omitted to examine an accused person under S. 342 would the words "make any amendment" entitle the Court of appeal to examine that accused person itself and itself to record such examination? Clearly no. Again suppose the lower Court had allowed a witness to make totally inadmissible and irrelevant statements, and had recorded those statements. Would the words "make any amendment" enable the appellate Court to strike out those statements from the record? I think not. I cannot find anything in S. 423 or anywhere else which gives an appellate Court express power to "expunge" anything from the record of the lower Court. Even if a Sessions Judge in charging the jury were to make revolting observations, the High Court could not, under its appellate powers, amend, alter or remove one word of them. We need not be alarmed. I am sure the High Court c could apply the censor's pencil under S. 561A, after holding that that portion of the summing up was an abuse of the process of the Sessions Court, and that it was necessary to erase it in the ends of justice. It could also, in my opinion, do it under its revisional powers which, as I shall presently show, include powers not specifically given, but implied by S. 435. My own view is that "make any amendment" means, generally speaking, make any amendment of a consequential or incidental nature with reference to what the appellate Court itself has ordered or directed. The other sections which treat of appellate powers are: Section 426 — Suspension of sentence and release on bail; Section 427—Arrest of a person against whose acquittal an appeal has been presented; Section

428—Taking of further evidence at the appellate stage.

An examination of the sections in Chap. 31 of the Code, which I have referred to, shows that appellate powers do not enable a Court to interfere with every order, finding or proceeding of the Court appealed from, but only with certain final orders and findings. The appellate Court cannot for instance reverse interlocutory orders and findings, and it cannot therefore correct proceedings of the lower Court which were not acquittals, convictions, sentences or final orders. For instance, it cannot reverse an order under S. 205, Criminal P. C., dispensing with or refusing to dispense with the personal attendance of an accused person, but this can be done in revision: 17 C. W. N. 1248.⁵ Again proceedings may be quashed in revision when no offence appears to have been committed, 52 Bom. 151;⁶ and proceedings may be stayed in revision, 56 Mad. 149;⁷ but the very fact that an appeal lies only from final orders prevents the appellate Court from accomplishing either quashing or stay.

Let us now examine the High Courts' revisional powers as indicated in the Code. I think there can be little doubt that the Legislature has in Ss. 435 and 439 manifested the intention that the High Court, in revision, may interfere with matters, and may exercise powers, beyond and in addition to the subjects and the powers to which an appellate Court is expressly confined by the sections contained in Chap. 31. Words appearing in S. 439 must be given their fullest natural and grammatical meaning. The words "may in its discretion exercise any of the powers conferred on a Court of appeal" cannot but mean that the Court is free to exercise at the dictates of its discretion, powers other than those conferred on a Court of appeal. And surely it is plain that the Court must draw upon a reservoir of powers more extensive, if it is to ensure what S. 435 refers to not only as "legality," but as "correctness," and as "propriety" of any "finding, sentence or order," and then further and in addition to that as "the regularity of any proceedings." This view is supported by a number of cases: 15 Cal. 608,⁸ 58 Cal. 1081,⁹

5. ('13) 23 I. C. 489: 17 C. W. N. 1248: 15 Cr. L. J. 281, *Raj Rajeshwari Devi v. Emperor*.

6. ('28) 15 A. I. R. 1928 Bom. 184: 108 I. C. 27: 29 Cr. L. J. 317: 52 Bom. 151: 30 Bom. L. R. 70, *In re Shripad Chandavarkar*.

7. ('32) 19 A. I. R. 1932 Mad. 720: 139 I. C. 773: 33 Cr. L. J. 826: 56 Mad. 149: 63 M. L. J. 594, *Pitchai v. Mahomad Atham*.

8. ('88) 15 Cal. 608 (F.B.), *Hari Das Sanyal v. Saritulla*.

9. ('31) 18 A. I. R. 1931 Cal. 619: 134 I. C. 915: 32 Cr. L. J. 1237: 58 Cal. 1081: 35 C. W. N. 374, *Phakir Mandal v. Madar Mandal*.

a 27 Bom. 84¹⁰ and 58 Bom. 40¹¹ at p. 42. In his instructive book on "Revision and Extraordinary Jurisdiction," Cecil Walsh J. has put the matter in these words :

"The original object of this legislation appears to have been to confer upon superior criminal Courts, in all cases where no appeal was provided, a kind of paternal or supervisory jurisdiction, without the intervention necessarily of any interested party, in order to correct any miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions, or apparent harshness of treatment, which has resulted on the one hand in some injury to the due maintenance of law and order, or on the other hand in some undeserved hardship to individuals The High Courts' powers of revision are specifically prescribed in sub-s. (1) (of S. 439). They are in substance such as may be exercised by a Court of appeal, and they leave little difference discernible between what the Court may do when sitting in appeal, and what it may order when sitting in revision. In practice substantial differences exist."

I have so far dealt with the scheme of the sections which treat of appellate and revisional jurisdiction, but the matter does not rest there. Though the High Court's revisional jurisdiction clearly extends beyond the limits of its appellate jurisdiction, the territory beyond those limits is left largely undefined since the words "correctness, legality or propriety of any finding, sentence or order," and the words c "the regularity of any proceedings," are not words of precise denotation and are unqualified. The vagueness does not however present any practical difficulty to us, because a practice has grown up, and is now well settled, in accordance with which the High Court in revision invariably refuses to interfere with anything otherwise than on certain recognised principles. Thus, all the High Courts act in practice upon the general rule that findings of fact should not ordinarily be interfered with in revision. It is clear that otherwise the whole time of the High Court might be consumed by application in revision: 58 Cal. 1081⁹ d at p. 1083. The practice nevertheless recognizes exceptions, for in practice again the High Courts do sometimes interfere in revision with findings of fact. But this, as I shall show, they never do in jury trials, for that is a principle of inflexible rigidity from which the Courts, acting under S. 439, will not depart. I am accordingly led to the conclusion that the words "the correctness, legality or propriety of any finding, sentence or order" and the words "the regularity of any proceedings" in S. 435, and the words "may in its discretion

exercise," in S. 439, do not throw the door e open for the exercise of any power or jurisdiction, but generally speaking, only of such as have received recognition in practice. To take another instance the Court will not interfere in revision so as to give a right of appeal where such a right is excluded by the other provisions of the Code : 36 ALL. 403.¹²

I shall now try to show the categories into which the revisional jurisdiction of the High Court may be regarded as logically falling. As has already been seen, appeals lie only from acquittals, from convictions and sentences, and from orders which are final. More- f over appeals do not lie from convictions and sentences, and final orders unless they are of the precise kind mentioned in what I may call the "appeal sections," or to Courts other than those therein respectively indicated. Under S. 439 (5), where an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed. This implies that proceedings in revision may be entertained if the Court desires to interfere suo motu. The Court does sometimes interfere suo motu in appealable cases when no appeal has been preferred. These constitute what I may call the first category, a category which g consists of matters from which appeals do lie.

Next, there is that group of cases in which the subject which calls for revision is a conviction, a sentence, or a final order, of a kind not stated in the appeal sections to be matters from which appeals lie to the High Court. These are not appealable to the High Court, but in nature and essence they are similar to the matters which are so appealable, because they are final and not interlocutory. This I would call the second category. When dealing with cases within these two categories the High Courts have invariably and consistently h exercised their discretion in one way and one way alone ; they have converted themselves into Courts of appeal, and have exercised no powers other than those conferred upon them by Ss. 338, 423, 426, 427 and 428, and also the power expressly and specifically given by S. 439 to enhance sentences. Incidentally it may be observed that under S. 439 (4) the High Court may not convert a finding of acquittal into one of conviction. The decisions which illustrate this are too numerous and varied to catalogue, but no case has ever been brought to my notice, other than a few cases under S. 439 (6) in which the High Court, when

10. ('03) 27 Bom. 84 : 4 Bom. L. R. 779, Emperor v. Varjivan Das.

11. ('33) 20 A.I.R. 1933 Bom. 482 : 147 I. C. 25 : 35 Cr. L. J. 317 : 58 Bom. 40 : 35 Bom. L.R. 1040, Shankarshet Ram Shet v. Emperor.

12. ('14) 1 A.I.R. 1914 All. 211 : 25 I. C. 350 : 36 All. 403 : 12 A. L. J. 511 : 15 Cr. L.J. 598, Ahsanullah Khan v. Mansukh Ram.

^a interfering either with an appealable finding or order, or a final finding or order of the same nature as an appealable finding or order, has employed any power not conferred upon it by Chap. 31. This limitation of the exercise of the Courts' powers is however now a matter of practice alone, for the words "may in its discretion," leave the Court entirely free to employ other powers not indicated in the appeal sections.

There remains the third category at which we arrive by a process of elimination. What is it that now remains? Only interlocutory orders and proceedings which generally speaking involve interlocutory orders. (These may be orders and proceedings in any case, whether the final finding or order in the case would cause it to fall in the appealable or non-appealable category.) In regard to such orders and proceedings only does the High Court draw upon what I may refer to as its reservoir of undefined powers. But even in regard to these, it is not untrue to say that though undefined by statute, the powers are sufficiently exhibited in the practice of the High Courts, and for practical purposes one knows that one may not invoke a hitherto unknown power to correct or rectify what is ^b a familiar error or defect. The powers which the High Court has in revision always exercised, and the errors and defects for the rectification and correction of which those powers have been always employed are now well known.

If there be an error or defect in an appealable finding or order, or in a final finding or order which is of a nature similar to that of an appealable finding or order, the High Court will search Ss. 338, 413, 427 and 428 to see if the remedy is there, or in the express words of S. 439, and if it is not, it will refuse to interfere. It will not arm itself with an ^a unrecognised power not expressly referred to in those sections which though it may exist, in the vague armory of which Ss. 435 and 439 assume the existence, has never yet been employed to correct an appealable finding or order, or a final finding or order similar to an appealable finding or order. In 58 Cal. 1081⁹ at p. 1086, Rankin C. J. enjoined referring Courts to bear in mind the limits which the High Court has, in practice, put upon its own discretion, and not to make a reference when the only objection is to the findings of the Court below upon the merits.

Now what are we invited to say here? We are invited to say that the High Court should interfere with a verdict, that is the final find-

ing in a jury trial, otherwise than upon grounds of misdirection or other error of law. That finding in the present case is appealable, and therefore falls within the first category which I have outlined above. If we are to follow our own constant and unfaltering practice then, in regard to that finding we will convert ourselves into a Court of appeal, and look at the question only as a Court of appeal must, subject of course to the express words of S. 439. In so doing we will exercise the powers given to a Court of appeal by S. 423, and expressly by S. 439, and those only. We will not exercise powers which are merely implied by Ss. 435 and 439. We should not, when dealing with appealable findings, depart one iota from our practice and that of every other High Court in the land. There is grave danger, in my opinion, in the step we are urged to take, and it will require an argument of the greatest cogency to persuade me that the Court is now to fashion out of an amorphous residue of power, some new instrument to which its practice is a stranger, for the purpose of reviewing the verdict of a jury, on the evidence, which in appeal it cannot do, and which in revision it has never done. The argument advanced by Mr. Talukdar that in a rule for enhancement of sentence, the accused is entitled to ask the Court to reverse the verdict of a jury if, in the Court's opinion, the evidence does not justify it, cannot be supported on the ground merely that there is somewhere a reserve of revisional power, upon which the Court has drawn in the past, and upon which it may draw again should the necessity arise. That necessity can arise only when the Court in its revisional operations encounters incorrectness, illegality or impropriety in a form or under circumstances in which precedent affords no guide. To Mr. Talukdar's persuasions the simple answer is the practice of the Court which has constantly repudiated the ^g power to interfere on facts with the findings of a jury.

Where the Court's powers are discretionary, and the manner of their exercise is not expressly defined by statutory provision, the practice of the Court tends to become the law of the Court, — *cursus curiæ est lex curiæ*. In the present case, guidance as regards the manner in which the Court's powers in revision may be exercised, is furnished by S. 423(2), which is attracted by S. 439 (1). The latter provision contains words which indubitably leave the matter to the Court's discretion; but notwithstanding this, that discretion has been uniformly exercised along the path to which S. 423 (2) points the way. In (1880) 6 Q. B. D.

a 530¹³ at p. 535, Thesiger L. J. in construing S. 11 of 32 and 33 Vic., C. 14, a provision which related to Inhabited House Duty, observed as follows :

"While it is true that we have no right to construe the Act itself by the practice which has taken place under that Act, it is equally true that we are entitled to construe that Act, not only upon the actual words used, but with reference to the practice which had grown up and was existing at the time when that Act was passed."

The rule laid down in the words above, applies, with much greater force to S. 439, Criminal P. C., because the practice existing immediately before the provisions contained in this section were first enacted in 1882, was, as regards revision of a jury's verdict, not practice merely but statutory law. As I shall presently show, the Code of 1872 expressly forbade the Court when acting in revision to set aside the verdict of a jury except on the ground of misdirection. In (1842) 3 Q. B. 792,¹⁴ an application for a certiorari to bring up an order passed by justices under the Poor Laws contained a prayer to bring up also the examination upon which the order was made, on the ground that these would show that there was no legal evidence to support the order. Lord Denman, in refusing the application, referred to an earlier case in which it had been held that the Court would take no notice of anything but the order, and said that an understanding prevailed that the Court ought not to do what it was being asked to do. He concluded his judgment with the words :

"Upon the whole we consider this to be a speculative novelty, without the warrant of any principle, precedent or authority, and that therefore there must be no rule."

In a bankruptcy case, 91 Buck 275¹⁵ at page 279, Lord Eldon said : "An inveterate practice in the law generally stands upon principles that are founded in justice and convenience." In (1841) 1 Q. B. 66=113 E. R. 1054¹⁶ Lord Denman stated :

"It is of much more importance to hold the rule of law straight than, from a feeling of the supposed hardship of any particular decision, to interpose relief at the expense of introducing a precedent full of inconvenience and uncertainty in the decision of future cases."

60 Cal. 618,¹⁷ was a case in which this Court

13. (1880) 6 Q.B.D.530: 50 L.J.Q.B. 132 : 44 L.T. 128: 28 W.R. 562: 45 J.P. 468, *Yewens v. Noakes*.

14. (1842) 3 Q. B. 792: 2 Gal & Dav 533: 114 E. R. 711, *Ex parte Tollerton Overseers*.

15. 91 Buck 275, *Ex parte Scott*.

16. (1841) 1 Q. B. 66: 4 Per & Dav. 679: 10 L. J. M. C. 49: 5 J. P. 370: 5 Jur. 1154: 113 E. R. 1054, *Queen v. Bolton*.

17. ('33) 20 A. I. R. 1933 Cal. 132: 142 I. C. 280: 34 Cr. L. J. 299: 37 C. W. N. 201: 60 Cal. 618, *Monmatha Nath Biswas v. Emperor*.

had occasion to expound the scope of a section of the Government of India Act, now repealed—S. 107 of the Act of 1915—which dealt with the High Court's powers of superintendence. Rankin C. J. after quoting the words of Lord Denman in (1841) 1 Q. B. 66,¹⁶ which I have set out above, proceeded to say:

"This is, in my opinion, more in consonance with the nature of the power of superintendence, with judicial principle and with the due administration of justice itself, than the alternative procedure which begins by refusing to recognise any limits to the power or any principles as fit to govern its exercise, and ends by vouching discretion for the result, after an open rehearing of each case."

In 8 Bom. 313¹⁸ a Full Bench of the Bombay High Court in deciding that where it appeared that a Court had not jurisdiction to hear a case, the plaint should be returned in order that it might be presented to the proper Court, and no additional court-fees were payable, held that the pre-existing state of the law as recognised by the tribunals was one of the chief means of interpreting laws of procedure. The judgment concluded with the words :

"We are of opinion that the long-established practice of this Court as to return of plaints was not opposed to the earlier law, and that it has, at least, indirectly been confirmed by the present law."

It is no argument to urge, as Mr. Talukdar has done, that the words "Notwithstanding anything contained in this section," with which sub-s. (6) opens, indicate an intention to override the appellate powers with all their limitations which are attracted by S. 439 (1). Mr. Talukdar's contention is that these words would enable the Court, when acting under sub-s. (6), to cast aside the fetters placed upon it as a Court of appeal by S. 423 (2). The fetters with which this Court acting as a Court of revision has here to cope are, however, at the present day, not those imposed by anything which S. 423 contains or S. 439 (1) in terms imports, but fetters which, as I have endeavoured to show, are really of its own fashioning in the operations of its practice. This practice does not founder in the words, "Notwithstanding anything contained in this section" because S. 439 though it may lead the Court to evolve or to continue a practice, does not anywhere expressly mention practice. The opening words of sub-s. (6) override the provisions of sub-s. (5), which prevent the Court from entertaining revisional proceedings at the instance of a party who has a right of appeal, but has not availed himself of that right. They also override the view, once taken, that the language of S. 439 (1) prevented a

18. ('84) 8 Bom. 313 (F. B.), *Probhakarbhat v. Vishwambhar Pandit*.

a person upon whom a rule for enhancement had issued from showing cause against his conviction on any ground whatever: see 32 Bom. 162.¹⁹ But those are, in my opinion, the only barriers which these words were designed to overcome.

The view that the language of sub-s. (6) of S. 439 does not take a rule for enhancement of sentence out of the operation of the principle that in revision the Court will not interfere with the verdict of a jury on the facts, has been recognised in the following cases: 61 Cal. 6,¹ 62 Cal. 952,² 43 C. W. N. 1032,³ I. L. R. (1940) Bom. 500²⁰ and 59 Mad. 904.²¹ In my judgment these decisions followed established practice, and are moreover not in conflict with any intention which the Legislature has elsewhere unambiguously expressed. I am not unaware of judicial observations of a general nature to the effect that the Court's discretion ought not to be made to run in grooves, and that it would be wrong to impose fetters on the exercise of powers which are left to the Court's discretion in each case as it arises. But such observations can have no possible application here. The discretion conferred upon a Court of revision by S. 439 (1) is not so free as all that. The earliest intention of the Legislature was to prevent the Court in revision from interfering with the verdict of a jury on facts. This was enacted in the Code of 1872, and was never expressly abrogated. Words placing this limitation on the Court's powers were left out of the revisional sections in the Code of 1882, and the subsequent Codes, but, as I shall presently show, that was because the limitation was also to be found in provisions dealing with appellate powers and these powers were then imported into the sphere of revision by wording a revisional section in such a manner as to make it attract the Court's appellate powers. It seems to me that this alteration in the scheme of the sections was largely a drafting device adopted for the purpose of securing brevity and the avoidance of repetition.

An examination of the history of the revisional sections will clearly show that the practice of not interfering with the verdict of a jury on facts, has grown out of statutory provisions. The frame work and language of the

19. ('08) 32 Bom. 162: 10 Bom. L. R. 93: 7 Cr. L. J. 119, *Emperor v. Chinto Bhairava*.

20. ('40) 27 A. I. R. 1940 Bom. 279: 140 I. C. 412: 41 Cr. L. J. 916: I. L. R. (1940) Bom. 500: 42 Bom. L. R. 475, *Emperor v. Ramji Vala*.

21. ('36) 23 A. I. R. 1936 Mad. 516: 164 I. C. 243: 37 Cr. L. J. 909: 59 Mad. 904: 71 M. L. J. 231, *Ratnasabapathy Goundan v. Public Prosecutor Madras*.

revisional sections have undergone changes since the first Code of 1861, and although it is unnecessary to discuss the reasons which have, from time to time, influenced the Legislature in making amendments, the steps in the process through which these provisions have passed would re-pay study. Even a cursory inspection of the successive sections assists also the further conclusion that while the revisional jurisdiction of the High Court is wider than its appellate jurisdiction, the revisional powers which constitute the overplus were never completely contained in definitive words, but were always to some extent, left to the Courts to work out in practice. A reference to some of the revisional sections in the earlier Codes is instructive. In the Code of 1861, three of the sections in Chap. 19 which was headed "Sudder Court as a Court of Revision" were as follows:

"404. *General power of revision by the Sudder Court* — The Sudder Court may, on the report of a Court of Session or of a Magistrate, or whenever it thinks fit, call for the record of any criminal trial or the record of any judicial proceeding of a criminal Court, other than a criminal trial, in any Court within its jurisdiction, in which it shall appear to it that there has been error in the decision on a point of law, or that a point of law should be considered by the Sudder Court, and may determine any point of law arising out of the case, and thereupon pass such order as to the Sudder Court shall seem right.

405. *Sudder Court empowered to call for and examine records of Court of Session* — It shall be lawful for the Sudder Court to call for and examine the record of any case tried by any Court of Session for the purpose of satisfying itself as to the legality or propriety of any sentence or order passed, and as to the regularity of the proceedings of such Court. If it appear to the Sudder Court that the sentence passed is too severe, the Sudder Court may pass any mitigated sentence warranted by law. If the Sudder Court shall be of opinion that the sentence or order is contrary to law, the Sudder Court shall reverse the sentence or order and pass such judgment, sentence, or order as to the Court shall seem right, or, if it deem necessary, may order a new trial.

406. *Proceedings of a case revised by Sudder Court to be certified to Court in which conviction was had* — Whenever a case shall be revised by the Sudder Court under this Chapter, the Sudder Court shall certify its decision or order to the Court in which the conviction was had or by which the order was passed, and such Court shall thereupon make such orders as are conformable to the decision of the Sudder Court, and if necessary amend the record in accordance therewith.

Proviso — Provided that, in any case which shall be revised by the Sudder Court under this Chapter, it shall not be competent to the Sudder Court to reverse the verdict of the jury, or, except as provided in this Chapter, to alter or reverse the sentence or order of the Court below."

Attention should be directed to the words, "as to the legality or propriety of any sentence or order passed, and as to the regularity of the proceedings of such Court" in S. 405, and also to the proviso to S. 406 which

a nevertheless at the same time prohibited the Sudder Court from reversing the verdict of a jury on any ground at all. In 11 W. R. Cr. 29²² a Full Bench of this Court had to consider the question whether it was open to the Court in revision under the Code of 1861 to order a new trial in a case in which the Judge's direction to the jury was bad in law. The answer given by the Full Bench was in the negative, and it will presently be noted that in the Code of 1872, the law was amended so as to empower the High Court in revision to set aside the verdict of a jury and to direct a new trial, whenever it was of opinion that the jury had b been misdirected. The intention of the Legislature not to allow the Court in revision to set aside the verdict of a jury on facts is thus manifest from the earliest years. In the Code of 1872, the sections to which a reference may be usefully made are the following:

"294. *Power to call for records of Subordinate Courts* — The High Court may call for and examine the record of any case tried by any Subordinate Court, for the purpose of satisfying itself as to the legality or propriety of any sentence or order passed, and as to the regularity of the proceedings of such Court.

297. *Power of revision* — If, in any case either called for by itself or reported for orders, or which comes to its knowledge, it appears to the High c Court that there has been a material error in any judicial proceeding of any Court subordinate to it, it shall pass such judgment, sentence or order thereon as it thinks fit.

Power to order commitment — If it considers that an accused person has been improperly discharged, it may order him to be tried, or to be committed for trial;

Power to alter finding and sentence — If it considers that the charge has been inconveniently framed, and that the facts of the case show that the prisoner ought to have been convicted of an offence other than that of which he was convicted, it shall pass sentence for the offence of which he ought to have been convicted;

d *Proviso as to power of altering finding* — Provided that, if the error in the charge appears materially to have misled and prejudiced the accused person in his defence, the High Court shall annul the conviction, and remand the case to the Court below, with an amended charge, and the Court shall thereupon proceed as if it had itself amended such charge.

Power to annul conviction — If the High Court considers that any person convicted by a Magistrate has committed an offence not triable by such Magistrate, it may annul the trial and order a new trial before a competent Court.

Power to annul improper, and to pass proper sentence — If it considers that the sentence passed on the accused person is one which cannot legally be passed for the offence of which the accused person has been convicted, or might have been legally convicted upon the facts of the case, it shall annul such sentence and pass a sentence in accordance with law.

If it considers that the sentence passed is too 22. ('68) 11 W R Cr. 29 (F.B.), Gorachand Ghose.

severe, it may pass any lesser sentence warranted by law; if it considers that the sentence is inadequate, it may pass a proper sentence.

Suspension of sentence — The High Court may, whenever it thinks fit, order that the sentence, in any case coming before it as a Court of revision, be suspended; and that any person imprisoned under such sentence be released on bail, if the offence for which such person has been imprisoned be bailable.

Power of revision confined to High Court — Except as provided in sections three hundred and twenty eight and three hundred and ninety eight, no Court, other than the High Court, shall alter any sentence or order of any Subordinate Court, except upon appeal by the parties concerned.

Optional with Court to hear parties — No person has any right to be heard before any High Court in the exercise of its powers of revision, either personally or by agent; but the High Court may, if it thinks fit, hear such person either personally or by agent. f

299. *Order on revision to be certified to lower Court or District Magistrate* — Whenever a case is revised by the High Court under this chapter, it shall certify its decision or order to the Court in which the conviction was had or by which the order was passed; or, if the conviction or order was passed by a Magistrate other than the Magistrate of the District, to the Magistrate of the District.

The Court or Magistrate to which the High Court certifies its order shall thereupon make such orders as are conformable to the decision of the High Court and, if necessary, the record shall be amended in accordance therewith:

In cases revised by the High Court under this 9 chapter, the High Court shall not alter or reverse the sentence or order of the Court below, except as herein provided; nor shall it reverse or set aside the verdict of a jury, unless it is of opinion that the jury was misdirected by the Judge. In that case it may set aside the verdict and direct a new trial, if it think fit to do so."

What is of interest here is the fact that although the wide scope of revision was again recognised in the words "as to the legality or propriety of any sentence or order passed, and as to the regularity of the proceedings of such Court" in S. 295, and the words "material error in any judicial proceeding" in section 297, paragraph 3 of S. 299 forbade interference with the verdict of a jury except when the High Court was of opinion that the jury had been misdirected. Attraction of appellate powers, in a section dealing with revision, first appears in the Code of 1882. In this Code the prohibition expressly contained in para. 3 of S. 299 of the Code of 1871 against interference with the verdict of a jury except on a ground of misdirection is not to be found in any of the sections which deal with revisional powers, but S. 439 (a revisional section) expressly says that the High Court may, in its discretion, exercise any of the powers conferred on a Court of appeal. In the Code of 1872, S. 271 which related to appeals from convictions in sessions trials, had provided that if h

- a the conviction was in a trial by jury, the appeal would be on a matter of law only. In the Code of 1882, this provision found place in S. 418, and in S. 423 which set out a number of appellate powers, it was enacted in the final clause that nothing contained in that section was to authorise the Court to alter or reverse the verdict of a jury, unless it was of opinion that such verdict was erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him. It seems to me reasonable to suppose that the scheme of the Code of 1882 was that, having embodied the prohibition against interference with a jury's verdict, on grounds other than misdirection, in an appellate section, it was considered superfluous to expressly repeat it in the revisional sections, when all the appellate powers together with their limitations were to be imported into the Court's store house of revisional powers by S. 439 in which there appear, for the first time in the Code, the words "the High Court may in its discretion exercise any of the powers conferred on a Court of appeal." This view finds support in a comparison of the revisional sections with the appeal sections as they stood in the Codes of
- b 1872 and 1882. To take an instance, in S. 297 (a revisional section) of the Code of 1872 a number of specific powers are enumerated such as the power to alter findings and sentences, to annul convictions, and to suspend sentences; similar powers are specifically given in S. 280 (an appeal section); there is virtual repetition, the reason being that there are no words in any section contained in the chapter on superintendence and revision which attract the High Court's appellate powers set out in the appeal sections. In the Code of 1882 the sections which deal with revision are silent about the power to alter findings and sentences,
- c to annul convictions and to suspend sentences. The reason is that these powers are specified in an appeal section—S. 423—and they are automatically attracted when the High Court acts in revision by the words in S. 439 "The High Court may, in its discretion, exercise any of the powers conferred on a Court of appeal."

Clauses (1) and (2) of S. 435 in the Code of 1882 were re-enacted in sub-ss. (1) and (2) of S. 435 of the Code of 1898. Provisions with which we are not concerned were added to the section by Act 18 of 1923. Section 439, as it stood in the Code of 1882, was repeated in the same form in the Code of 1898, except that its four clauses were numbered as sub-sections, and sub-s. (5) was added. Act 8 of 1923 deleted the figure '195' after the word 'sections' in

sub-s. (1) and it enacted sub-s. (6), which as already stated is in these terms:

"Notwithstanding anything contained in this section any convicted person to whom an opportunity has been given under S. 2 of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction."

Are we to say that we are justified by the language of this provision in allowing a convicted person to urge that the verdict of the jury which found him guilty ought to be set aside because the evidence does not support it? My answer to this question must, for the reasons I have stated, be emphatically in the negative. Jenkins C. J., in 28 Bom. 533,²³ in repelling the argument that the language of S. 439 was capable of sustaining a rule of practice which would justify the High Court in refusing to interfere in revision with findings of fact in trials not held by jury, observed that the Court ought not to fetter its own discretion. The rule laid down in that case has been followed in this Court, which, as I have already stated, does in practice sometimes interfere in revision with findings of fact in trials not held by jury. The power to interfere in revision on grounds of fact in trials other than jury trials has never at any time been expressly negatived by the Code and so any practice to the contrary would have no statutory foundation to support it. The observations of Jenkins C. J., cannot therefore be called in aid of the argument under consideration here which is that this Court in revision has the power to interfere also with the verdict of a jury on facts.

But, proceeds the argument, even if it is the rule, that not even in revision will the High Court interfere with the verdict of a jury except on the ground of misdirection, the Court must make an exception to that rule in cases of the type to which the present case appertains, cases in which the convicted person is striving to ward off a sentence of death. It is here pointed out that the principle underlying such an exception has been accepted by the legislature, which in its wisdom has given effect to the exception in other sections of the Code. Under S. 374, whenever the Court of session passes a sentence of death the proceedings must be submitted to the High Court. In S. 376, it is provided that in any case submitted under S. 374, whether the case was tried with assessors or by the aid of a jury, the High Court may confirm the sentence, or may annul the conviction and convict the accused of any offence of which the sessions Court

23. ('04) 28 Bom. 533 : 6 Bom. L. R. 379 : 1 Cr. L. J. 390, *Emperor v. Bankatram Lachiran*.

a might have convicted him, or may acquit the accused person. Further, this privilege, which actually amounts to an appeal on facts whether the trial was held with a jury or with assessors, has not been confined to persons upon whom capital sentence has been pronounced, but has been extended by S. 418 (2) to persons not sentenced to death, who have been convicted in the same trial with a person so sentenced. Verily the way of the Legislature, like that of an eagle in the air, is sometimes too wonderful for me. The right to challenge the verdict of a jury on facts is expressly given to the person who has been sentenced to death; b it has been expressly given to the person who, though not so sentenced, has been convicted in the same trial as the person upon whom capital punishment has been pronounced; it has not been expressly given to the person, who by reason of a rule for enhancement of sentence issued by this Court, stands in peril of being hanged. It is a glaring anomaly amounting to contradiction, and it is unfair. We are asked to ease the anomaly, and to rectify the unfairness. The view taken by my learned brothers, other than Sen J., is that we may do so on the principle that the Legislature could not surely have intended c such a result. In other words, it is to be presumed that the Legislature would not have permitted S. 439 (6) to stand as it does had it been fully aware of the bearing on it of S. 418 (2) and S. 376. Now, there are two well known rules of interpretation which arise to confront this reasoning. The first is that the intention of the Legislature is not to be speculated upon. In (1897) A. C. 22²⁴ at p. 38 Lord Watson stated the rule as follows :

“ ‘Intention of the Legislature’ is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although d there has been an omission to enact it. In a Court of law or equity, — what the Legislature intended to be done, or not to be done can only be legitimately ascertained from what it has chosen to enact, either in express words or by reasonable and necessary implication.”

Here the Legislature has enacted in the clearest terms in S. 423 (2), that in appeal the Court shall not alter or reverse the verdict of a jury unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of a jury of the law as laid down by him, and the case out of which the present reference has arisen is an appealable case. Be it noted also

that none of the accused had the special right e of appeal provided in S. 418 (2) because no one had been sentenced to death. But, persists the argument, this is revision, and in revision there are no definitely visible limits to the Court's power. That may be so, but in appealable cases as already pointed out the Court's practice in revision follows the law which governs appeals. I would repeat that it is not an arbitrary practice that in revision the Court will not interfere with the verdict of a jury on facts. As already seen that was expressly the law under the Codes of 1861 and 1872, the present practice has its roots in law, and there is nothing in the law as it now f stands which overrides that practice. In these circumstances our practice is binding on us.

Speaking for myself, I am conscious of a pronounced aversion to saying anything which would have the effect of circumscribing this Court's discretionary powers, but when I find that those powers have always uniformly been exercised in a certain manner which is not inconsistent with the language of an existing statute, and that the practice which governs that exercise is founded on earlier statutory provisions which have never been expressly repealed, I am not prepared to allow my natural inclination to override good sense, g and to read into words a remoter meaning than that which they reasonably bear. Therefore when S. 439 says that the High Court may in its discretion exercise any of the powers conferred on a Court of appeal, I must take it to mean that the discretion is to be exercised only in a manner which conforms with established practice. The second rule of interpretation which is in conflict with this reasoning is that it is not for the Court to supply a *casus omissus*. In (1846) 6 Moo. P. C. 9²⁵ the Judicial Committee put this canon of construction in these words :

“We cannot aid the Legislature's defective phrasing of an Act, we cannot add and amend, and by construction make up deficiencies which are left there.” h

“If”, said Lord Brougham, in (1840) 7 Cl. & F 696,²⁶ “we depart from the plain and obvious meaning on account of such views, we do not in truth construe the Act, but alter it. We add words to it, or vary the words in which its provisions are couched. We supply a defect which the Legislature could easily have supplied, and are making the law, not interpreting it.”

As I have shown, our practice follows the statute. The former we should not lightly vary, the latter we may not amend. To deal with the present case, and others of the same type, in which a rule has been issued for enhancing a sentence of imprisonment or transportation

24. (1897) 1897 A. C. 22 : 66 L. J. Ch. 35 : 75 L. T. 426 : 45 W. R. 193 : 4 Manson 89, Salomon v. Salomon & Co.

25. (1846) 6 Moo. P. C. 9, Crawford v. Spooner.

26. (1840) 7 Cl. & F 696, Gwynne v. Burnell.

a to one of death, as though they were exceptions to the rule that the Court will not interfere with the verdict of a jury on facts, would, in my judgment, be not only to make a fundamental departure from our established practice but would also virtually amount to legislating. The Legislature has in an unmistakable manner refrained from giving its assent to the proposition that in revision of the present kind the High Court may interfere with a jury's verdict on fact. At the time when sub-s. (6) of S. 439 was enacted, the Legislature certainly had before it the case of persons who had been convicted in trials by jury of offences punishable with death, but had not been sentenced to suffer the extreme penalty. It was the same Act (Act 18 of 1923) which placed sub-s. (6) of S. 439 and sub-s. (2) of S. 418 on the Statute Book. It is somewhat startling that whereas it was giving the right to challenge the verdicts of juries on facts to a certain class of convicted persons in one situation, it was not giving it to the self-same class in another situation, there being between the two situations no discernible difference of principle. Are we to assume that the Legislature had forgotten sub-s. (2) of S. 423, or that it relied on the wide implications of ss. 435 and 439, and was totally ignorant of the well-founded practice of the High Courts not to interfere in revision with appealable orders except as provided in the appeal sections and expressly in S. 439? I am unable to subscribe to such an assumption.

I realise the anomaly and the unfairness, and the only course open to me is to take up the same position as I did, along with my learned brother Henderson, in 43 C. W. N. 1032,³ in which we refused to enhance the sentence to one of death on the ground that in so doing we would be placing the accused person in a worse position than he would have been in had he been sentenced to death by the Sessions Judge. I adhere to that attitude. Being powerless to reverse the verdict of a jury on fact, except under S. 418(2) and S. 376, I shall decline to interfere when a rule has been issued to show cause why a person convicted in a jury trial should not be sentenced to death, for in pronouncing upon him the extreme penalty of the law, without allowing him to say that on the evidence he should be acquitted, I would be drawing between him and a person who had already been sentenced to death or an appellant who had been convicted along with such a person a distinction that would be ridiculous. The consideration that in persisting in such an attitude I might be failing in a judicial duty does not oppress me, because, revision is in any event discretionary. I have one word more

to say. Section 439 sub-s. (6) not only gives a convicted person the right to show cause against his conviction, but it acknowledges the right, already included in sub-s. (2) of showing cause why his sentence should not be enhanced. Mr. Bhattacharjee, who appeared for the Crown, rightly conceded that in showing cause against enhancement of his sentence a convicted person is entitled to take the Court fully and freely into the evidence. The two rights are separate rights, and it is very clear that no Court can properly determine what sentence would be appropriate without examining the whole of the evidence for itself regardless of what the jury may have thought. This is of the greatest importance, and should never be lost sight of when any rule for enhancement comes up for consideration.

In the result, I would answer the question which this reference contains by saying that in a case in which an accused person has been called upon to show cause why his sentence should not be enhanced to a capital sentence in accordance with the procedure laid down in S. 439, Criminal P. C., such person has not the right to contend that the verdict of the jury was based upon an erroneous view of the evidence and the facts of the case. I would also say that in my opinion, the cases in 61 Cal. 6,¹ 62 Cal. 952² and 43 C. W. N. 1032³ were rightly decided.

Lodge J.—The question submitted to the Full Bench is as follows:

"In a case such as that with which we are now dealing in which an accused person has been called upon to shew cause why his sentence should not be enhanced to a capital sentence, in accordance with the procedure laid down in S. 439, Criminal P. C., has such a person a right to contend that the verdict of the jury was based upon an erroneous view of the evidence and the facts of the case?"

During argument a distinction was made between rules for enhancement in which a sentence of death might be imposed, and other rules for enhancement, in which there could be no question of imposing sentence of death. In supporting the views expressed by the learned Judges who made the reference, Mr. Talukdar who appeared for the appellant in Appeal No. 96, contended that the powers exercised by the High Court in its revisional jurisdiction are not limited to those prescribed in S. 439 (1), Criminal P. C., and for this purpose he contended that powers of revision are also conferred on the High Court under S. 435 of the Code and there are also powers inherent in the High Court which are not to be found in the Code of Criminal Procedure.

Mr. Talukdar next argued that even if the powers of the High Court in revision are

a ordinarily limited to those set out in S. 439 (1), Criminal P. C., those powers are extended by the special provisions of S. 439 (6). With regard to the first branch of the argument, it is sufficient to say that the power to issue a rule for enhancement of sentence and the power to enhance sentences are specifically conferred upon the High Court by S. 439 of the Code, and the conditions under which that power is to be exercised are laid down in the section. In these circumstances, whatever may be the position with regard to other cases of revision, we are of opinion that the powers of the High Court in dealing with rules for enhancement
b are to be derived from the provisions of this section. Section 439 (1) provides :

"In a case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of appeal by Ss. 423, 426, 427 and 428 or on a Court by S. 338 and may enhance the sentence; and when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in manner provided by S. 429."

With the possible exception of sub-s. (6) there is nothing else in the section which purports to give the High Court still wider powers when sitting as a Court of revision. We may
c ignore, for the present, Ss. 426, 427, 428 and 338 of the Code, and for our purposes treat S. 439 (1) as conferring upon the High Court when sitting as a Court of revision, the powers conferred on a Court of appeal by S. 423 of the Code. Therefore, when considering whether to revise any conviction, acquittal or other order of a Subordinate Court, the High Court may in its discretion treat the order in question as though it were an appealable order and as though an appeal from it had been duly presented. If the whole of S. 423 of the Code is applicable in such a case, the limitation contained in S. 423 (2) is also applicable.
d Mr. Talukdar argued that the Court is entitled to exercise all the powers conferred by S. 423 without any of the limitations contained in the section. The fact that the legislature made special provision for enhancement of sentences in S. 439 (1) does not support the view that the Court is not bound by the limitations on its power imposed in S. 423.

We have not been shown any case in which any High Court in India has claimed in ordinary rules (i.e., not rules to enhance sentences) the power to alter or reverse the verdict of a jury without being of opinion that such verdict was "erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down by him." On the other hand, two decisions of this

Court, namely, 41 C. L. J. 320²⁷ and 32 C. W. N. 673²⁸ seem to be consistent with the view that S. 423 (2) applies equally to revision cases. We see no reason for holding that S. 423 (2) is not binding on a Court of revision when dealing with rules other than rules for enhancement of sentence. Section 439 (2) reads :

"No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence."

Section 439 (6) reads :

"Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-s. (2) of showing cause why his sentence should not be enhanced shall, in showing cause be entitled also to show cause against his conviction." *f*

It has been contended first that the phrase "shall . . . be entitled also to show cause against his conviction" must mean that he can show any cause whatever and not merely such cause as, in other circumstances, the Court is entitled to act upon; and secondly, that the phrase "notwithstanding anything contained in this section" must mean, among other things, that the Court is no longer restricted to the powers conferred by S. 439 (1). In our opinion the phrase "shall . . . be entitled also to show cause against his conviction" confers a right
g upon the accused, but does not extend the powers of the Court, which are still limited to those set out in S. 439 (1). Similarly the phrase "notwithstanding anything contained in this section" removes bars contained in the section which previously prevented the convicted person from showing that his conviction was not sustainable even by a Court acting within the limits prescribed by S. 423. Thus the bar provided by S. 439 (5) was removed in these cases, and the bar imposed in practice by High Courts on the strength of the words "in its discretion" in S. 439 (1) was also removed. In fact, there seems reason to believe that the sub-section was inserted in 1923 for the purposes of removing this latter bar which had
h been imposed in 32 Bom. 162¹⁹ where the learned Judges observed :

"It has been the invariable practice of this Court in such cases to accept the conviction as conclusive and to consider the question of enhancement of sentence on that basis. That practice has been consistently adhered to by this Court for over 25 years now, and ought, we think, to be followed. . . It was open to the opponent to apply for revision of the conviction, but having failed to avail himself of that, he cannot be permitted to assail the conviction in a proceeding where

27. ('25) 12 A.I.R. 1925 Cal. 795 : 87 I. C. 606 : 26 Cr. L. J. 1006 : 41 C. L. J. 320, Saroda Charan v. Emperor.

28. ('28) 15 A.I.R. 1928 Cal. 444 : 111 I. C. 323 : 29 Cr. L. J. 819 : 47 C. L. J. 483 : 32 C.W.N. 673, Bepin Chandra Mandal v. Emperor.

a the sole question is whether the sentence passed by the lower Court is adequate or not."

In our opinion, there is nothing in the language of S. 439 (6) to suggest that the powers of a Court of revision, dealing with a rule for enhancement, are wider than the powers conferred by S. 423 on a Court of appeal. This is the view taken by this Court in 61 Cal. 6¹ and in 62 Cal. 952² and the view accepted as correct in 43 C. W. N. 1032³ and 40 Cr. L. J. 877.⁴ The same view has been taken in 50 Bom. 783,²⁹ I. L. R. (1940) Bom. 500,²⁰ 59 Mad. 904,²¹ A. I. R. 1936 ALL. 850,³⁰ 10 Pat. 872³¹ and 10 Lah. 241.³² No case has been cited (in which there was no question of a death sentence being imposed) in which the contrary view has been taken. In the circumstances we are of opinion that 61 Cal. 6¹ and 62 Cal. 952² were rightly decided. The question whether the Court has wider powers in cases where a rule is issued to show cause against enhancement of sentence to a capital sentence, requires separate consideration. In 43 C. W. N. 1032³ Henderson J. observed :

"We are bound to say that in our opinion the reasons given by the learned Judge for passing a lesser sentence are far from convincing. However, had the learned Judge done his duty, the appellants would have been entitled to ask us to go into the facts and to acquit them if we were not satisfied with the evidence. They certainly cannot be put in a worse position, because of this failure of the learned Judge and we shall certainly not sentence them to death unless we are ourselves satisfied that the evidence ought to be believed."

It is now well settled in this Court that on an appeal from the verdict of a jury, an accused person is not entitled to appeal on the facts merely because he is called upon to shew cause why the sentence should not be enhanced.

In one of these cases a short time ago the learned Deputy Legal Remembrancer stated that the Crown would not certainly oppose our examining the facts in order to see whether a sentence of death should be imposed. But the Crown would strenuously oppose an attempt to upset the verdict merely because we disagreed with the jury on the proper view of the facts. We are not prepared to take this course. It would mean that there would be two final Courts of fact on exactly the same evidence, one to decide whether the accused is to be convicted and another to decide whether he is to be sentenced to death. That is the system which is in vogue in connexion with conspiracy trials. Both my learned brother and I have been protesting against it for years and we shall certainly do nothing to encourage it."

29. ('26) 13 A. I. R. 1926 Bom. 555 : 97 I. C. 805 : 27 Cr. L. J. 1173 : 50 Bom. 783 : 28 Bom. L. R. 1051, Emperor v. Jorabhai Kisabhai.

30. ('36) 23 A. I. R. 1936 All. 850 : 166 I. C. 176 : 1936 A. L. J. 1287 : I. L. R. (1937) All. 308 : 38 Cr. L. J. 137, Emperor v. Vishwanath.

31. ('32) 19 A. I. R. 1932 Pat. 126 : 135 I. C. 522 : 33 Cr. L. J. 155 : 10 Pat. 872 : 13 P. L. T. 17, Ram Lakhan v. Emperor.

32. ('29) 16 A. I. R. 1929 Lah. 797 : 117 I. C. 669 : 30 Cr. L. J. 815 : 10 Lah. 241 : 30 P. L. R. 409, Emperor v. Dhanna Lal.

In 40 Cr. L. J. 877⁴ Henderson J. observed :
"The murder was a brutal and cold blooded one. There were no extenuating circumstances of any sort and the reasons given by the learned Judge for not inflicting the death sentence do not commend themselves to us."

The position however is as usual very difficult from the practical point of view . . . we cannot examine the facts for ourselves to decide whether the appellants are guilty or not. Being placed in that position, we are certainly not going to inflict a sentence of death. The result of the failure of the learned Judge to do his duty in this case was that the appellants are precluded from asking us to examine the evidence in the case to see whether we are ourselves satisfied of their guilt. It would be an intolerable position if in such circumstances they were to be sentenced to death. We shall not therefore interfere with the sentences . . ."

In these two cases, the learned Judges have not held that they are entitled to reverse the verdict of the jury in cases where there are no misdirections, nor have they held that they have no power to enhance the sentences. The most that can be said is that the learned Judges have in their discretion refused to consider whether they were fit cases for enhancement of sentence because they were of opinion that they had no power to acquit the convicted persons if they were not satisfied of their guilt. In effect the learned Judges said :

"We shall not enhance the sentences of those persons who deserve to be hanged, because we have no jurisdiction to acquit those whom we consider to be innocent."

I am not satisfied that this policy of non-co-operation with the Legislature is the correct policy for the Court to adopt. Incidentally there is nothing in S. 423 (2) to prevent the Court of appeal or revision examining the evidence : the Court is merely prevented from altering or reversing the verdict except on certain grounds. The Court may examine the evidence for any other purpose. The real problem is whether in a case in which, if his guilt is proved, the convicted person deserves to be sentenced to death, the Court is entitled to examine the evidence and acquit the accused as if there had been a reference under S. 374. It is clear that the Court can examine the evidence. It is clear that the Court can in suitable cases enhance the sentence to a sentence of death. The intention of the Legislature, so far as it can be ascertained from the Code of Criminal Procedure, is that save and except in those cases in which sentence of death is passed, the verdict of the jury shall be final, provided that there are no misdirections in the charge and the jury have not misunderstood the law and provided that the Sessions Judge does not make a reference under S. 307. On the other hand, when an accused is sentenced to death, the sentence must be submitted to

a the High Court under S. 374 for confirmation. When a case is so submitted the High Court may examine the evidence and if it thinks fit acquit the accused. Consider what would be the result if an accused person were found guilty in a trial by jury of an offence punishable under S. 303, Penal Code, and if the Sessions Judge through mistake sentenced the accused to transportation for life, and then, discovering his mistake reported the matter to the High Court. Is the Court bound to accept the verdict of the jury and sentence the accused to death?

b Is the Court entitled to refuse to pass the only legal sentence which can be imposed for such an offence? Or is the Court free to treat the matter as though the Sessions Judge had passed a legal order and had made the necessary reference under S. 374? It seems to me obvious that if the last of these courses can be justified, it ought to be adopted by the Court. Similarly, in cases where the obvious sentence is death if the accused is really guilty, but the accused has been sentenced to transportation for life, the Court ought after issuing a rule to treat the case as though the Sessions Judge had passed the proper sentence and made a reference under S. 374, if this course can be c justified under the provisions of the Code. In my opinion, such a course, though unusual can be justified without doing violence to the language of the Code. The question what is the proper sentence in a particular case is a question of law. If the Sessions Judge gives a sentence which is not appropriate, he commits an error of law, which can be corrected in revision. Ordinarily when the order of a Subordinate Court to be revised, is the final order in the case, the High Court on revision passes the proper order, when, however, further proceedings have to be taken after the proper order is passed, the High Court has d never hesitated to set aside the order of the Subordinate Court and direct that Court to proceed according to law. I can see no serious objection to the High Court holding that a sentence other than a sentence of death is inappropriate if the accused is guilty and remanding the case to the Sessions Judge with a direction to pass that sentence and make a reference under S. 374. This procedure, though admittedly unusual, would in my opinion give effect to the intentions of the Legislature as expressed in the Code of Criminal Procedure. Further, as the passing of the appropriate sentence and the making of a reference under S. 374 is not discretionary, there seems to be no reason why the High Court should not, in suitable cases, act as though the appropriate

e sentence had been passed and the necessary reference made. If this procedure is not justifiable then the proper procedure would apparently be for the Court to examine the evidence to determine whether sentence of death should be passed, and then, if satisfied from the evidence that the conviction cannot be sustained, refuse to pass sentence of death because the evidence does not justify the verdict of the jury and bring the case to the notice of the Local Government.

It is interesting to note that in A. I. R. 1933 Bom. 153³³ the Bombay High Court expressed the view that in a rule for enhancement of sentence to a capital sentence, the Court could f acquit if the accused shewed on the facts that he was entitled to acquittal though the learned Judges were prepared to follow the decision in 50 Bom. 783.²⁹ Our answer to the reference should therefore be that in cases where the death sentence is not involved the Court of revision is not authorised to alter or reverse the verdict of a jury unless it is of opinion that such verdict is erroneous owing to a misdirection by Judge or to a misunderstanding on the part of the jury of the law as laid down by him. But in cases where the death sentence is the proper sentence if the accused is guilty, the Court of revision, on a rule to g enhance the sentence, has all the powers that it would have if the appropriate sentence had been passed by the Sessions Court and a reference made under S. 374 of the Code.

Roxburgh J. — I agree with my learned brother Lodge J.

Akram J. — I agree with my learned brother Lodge J.

Sen J. — The question sent to us for determination has been formulated thus:

"In a case such as that with which we are now dealing in which an accused person has been called upon to show cause why his sentence should not be h enhanced to a capital sentence in accordance with the procedure laid down in S. 439, Criminal P. C., has such person a right to contend that the verdict of the jury was based upon an erroneous view of the evidence and the facts of the case?"

If I may say so, with respect, the question has not been very accurately framed. The point for decision is not whether a person convicted of murder may resist the enhancement of his sentence on the ground that the verdict of the jury is wrong because it is based on an erroneous view of the evidence and the facts of the case. The point is whether he may claim that his conviction be set aside on this ground. I

33. ('33) 20 A.I.R. 1933 Bom. 153 : 148 I.C. 553 : 35 Cr. L. J. 747 : 35 Bom. L. R. 174, Ramchandra Shankarshet v. Emperor.

^a would formulate the question thus: "When a person convicted of murder and sentenced to transportation for life is called upon to show cause under S. 439 (2), Criminal P. C., why he should not be sentenced to death and he also shows cause against his conviction in the exercise of his right to do so under S. 439 (6) of the aforesaid Code, has he the right, when showing cause against his conviction, to demand that the verdict of the jury be altered, reversed or set aside on the ground that it is wrong on facts although there has been no misdirection by the Judge or misunderstanding by the jury of the law as laid down by the Judge on any other error of law."?

^b The point involved is a narrow one as it is restricted to the case of a person convicted of murder; but in order to decide it we must determine a broader question viz., the rights which a person convicted of an offence, has, when he shows cause against his conviction before this Court, in the exercise of the right given to him by S. 439 (6), Criminal P. C. This Court in its appellate jurisdiction has not the power to enhance a sentence. This is emphasised in the provisions of S. 423 (b), Criminal P. C. A sentence, however, may be enhanced by this Court acting in its revisional jurisdiction. When a convicted person is called upon to show cause why his sentence should not be enhanced he is given two rights viz., (1) the right to be heard on the question of enhancement, S. 439 (2); (2) the right to show cause against his conviction, S. 439 (6). As such convicted person may claim an acquittal, it is quite obvious that before deciding on the question of enhancement of the sentence the Court must decide whether the conviction can stand in law. The second right must be investigated first. The extent of this right is the matter for our determination. On behalf of the Crown, Mr. Bhattacharjee's contentions, ^c as I have understood them, are as follows:

^d In showing cause against his conviction the accused can show only such cause as he could have shown on an appeal; and in entertaining such cause the Court can exercise only such powers as it has in its appellate jurisdiction. When the trial was by jury, this Court, in dealing with a cause shown under S. 439 (6), cannot alter or reverse a verdict of a jury unless such verdict is erroneous by reason of a misdirection of the Judge or a misunderstanding of the law as laid down by the Judge. This Court may also set aside the conviction on any other ground of law which would justify an appellate Court in setting it aside. In short, he argues that the revisional powers of this Court in such a matter are co-extensive

and co-terminous with the powers of this Court on appeal. He says further that in determining whether the sentence should be enhanced, this Court may, and indeed should, in every case, whether it be one tried by jury or not, go into the facts and form its own opinion on them. If it is of opinion on the evidence that the accused is not guilty it will not enhance the sentence. In a case not tried by jury it will also acquit the accused; but in a case tried by jury it is powerless to set aside the conviction unless there is such misdirection by the Judge or such other error of law as would entitle an appellate Court to set aside the verdict of the jury. All it can do in such a case is to refuse to enhance the sentence and if it thinks proper, to draw the attention of Government to the case for action under S. 401, Criminal P. C., recommending a suspension or remission of sentence. He bases his contention on the provisions of Ss. 423 and 439 (1), Criminal P. C. His argument is this: Section 423 confers certain powers and imposes certain limitations upon the appellate Court. One of the limitations is contained in sub-s. (2) of S. 423 which says that the appellate Court shall not alter or reverse a verdict of the jury unless it is erroneous by reason of a misdirection of the Judge or a misunderstanding by the jury of the law as laid down by the Judge. Section 439, Criminal P. C., confers certain powers on this Court in its revisional jurisdiction. Those powers are enumerated in sub-s. (1) of S. 439 which is as follows:

"In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of appeal by Ss. 423, 426, 427 and 428 or on a Court by S. 338, and may enhance the sentence; and when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in manner provided by S. 429."

This sub-section enacts that in dealing with the conviction of a person this Court in revision cannot do anything which an appellate Court could not have done. On behalf of the accused, Mr. Talukdar's contention is this: The powers of this Court on revision are far wider than its powers on appeal. The limitations imposed on this Court, exercising its appellate jurisdiction, will not apply to its revisional jurisdiction. In any case, even if it be held that S. 439 (1) limits the revisional jurisdiction of this Court in certain matters, these limitations are not imposed upon the Court when it hears a cause shown under S. 439 (6), inasmuch as that sub-section begins

a with the phrase "Notwithstanding anything contained in this section," a phrase which excludes the operation of any limitation upon the powers of the Court which sub-s. (1) may contain. In this view Mr. Talukdar contends that this Court, in hearing a cause shown against a conviction in a proceeding under S. 439 (6), may interfere with the verdict of a jury on a question of fact.

The question involved therefore may be put shortly thus: In considering a cause shown against a conviction in accordance with the provisions of S. 439 (6), are the powers of this Court on revision limited to the powers of this Court on appeal? The decisions of this Court in 61 Cal. 6¹ and 62 Cal. 952² certainly support the view put forth on behalf of the Crown. I have given the matter my most anxious consideration and after mature thought I feel that I must respectfully dissent from this view. In my opinion this Court, dealing with a cause shown under S. 439 (6) against a conviction, has the power to go into facts in every case whether tried by jury or not, and to set aside the verdict of a jury on the ground that the appreciation of the evidence by the jury is wrong. It will, of course, give due weight to the opinion of the jury regarding the facts, but after doing so, it has the power to set aside the verdict if it is of opinion that the verdict cannot be supported on the facts.

I shall now give my reasons for this view. The powers of a Court of Justice are of a two-fold nature: Firstly, it is given power to entertain certain matters and investigate them in a certain manner in order that justice may be done. Secondly, it is given power to grant certain reliefs by passing particular orders and directions after it has entertained and investigated those matters. The Criminal Procedure Code recognises this distinction and deals with each kind of power separately. So far as the powers of this Court on appeal are concerned, the two main sections are S. 418 and S. 423. Section 418 deals with the first kind of power and S. 423 with the second kind. Section 418 is as follows:

"(1) An appeal may lie on a matter of fact as well as a matter of law, except where the trial was by jury, in which case the appeal shall lie on a matter of law only.

(2) Notwithstanding anything contained in sub-section (1) or in S. 423, sub-s. (2), when, in case of a trial by jury any person is sentenced to death, any other person convicted in the same trial with the person so sentenced may appeal on a matter of fact as well as a matter of law."

It is this section that gives power to this Court to entertain an appeal on a matter of

fact as well as of law in all cases except where the trial was by jury, and it is this section which limits the powers of this Court entertaining an appeal where the trial was by jury to the consideration of an error of law only. I shall now deal with S. 423. It consists of two parts. Section 423 (1) runs as follows:

"The appellate Court shall then send for the record of the case, if such record is not already in Court. After perusing such record, and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and, in case of an appeal under S. 417, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may,

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction, (1) reverse the finding and sentence, and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such appellate Court or committed for trial, or (2) alter the finding, maintaining the sentence, or with or without altering the finding, reduce the sentence, or (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence, but, subject to the provisions of S. 106, sub-section (3), not so as to enhance the same;

(c) in an appeal from any other order, alter or reverse such order;

(d) make any amendment or any consequential or incidental order that may be just or proper."

This sub-section merely catalogues a list of orders or reliefs which an appellate Court, with powers already defined and circumscribed by S. 418, may pass or grant when disposing of an appeal. These orders may be passed and these reliefs may be granted whether the appeal arises from a case tried by a jury or not. Section 423 (1) does not prescribe one set of orders or reliefs for appeals arising from trials by jury and another set for appeals arising from other forms of trial. There is no such discrimination. After giving a list of the possible orders or reliefs that may be passed or granted by the appellate Court in sub-s. (1) the Legislature enacted sub-section (2) in these terms:

"Nothing herein contained shall authorise the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him."

I would draw attention to the words "Nothing herein contained shall authorise the Court." The sub-section does not empower the Court to do anything, nor does it limit the Court's powers. All it does is to explain that the first part of S. 423 does not authorise the Court to

- a do certain things. The reason why the first part of S. 423 does not authorise the doing of these things is to be found in S. 418. Section 423 (2) therefore merely explains S. 423 (1) with reference to the limitations contained in S. 418. It is purely explanatory and is there '*ex abundanti cautela*.' What it says in effect is this: Section 418 limits an appeal in a case tried by a jury to a matter of law; therefore any and every erroneous verdict cannot be altered, reversed or set aside; it can only be altered, reversed or set aside if the error is due to a misdirection by the Judge or a misunderstanding of the law by the jury. Even if
- b S. 423 (2) were not there, the appellate Court would still not have the power to set aside a verdict of the jury unless there was an error of law as this limitation on the power of the appellate Court has already been imposed by section 418.

I may point out further that it would be wrong to suppose that sub-s. (2) of S. 423 prescribes the limits of the power of an appellate Court to interfere with a conviction when the trial was by jury. The appellate Court may set aside an order of conviction passed in a trial by jury for many reasons other than those mentioned in S. 423 (2). Even when there

c is no erroneous verdict by reason of any misdirection or misunderstanding, the appellate Court may yet set aside the verdict on other grounds of law, e. g., misjoinder of charges, defects in the empanelling of jurors, failure to examine an accused person under S. 342, Criminal P. C., and various other grounds of law. It seems to me clear that S. 423 does not deal with the first kind of power of the Court of appeal, viz., the power to entertain appeals and to investigate questions of fact or law when entertaining appeals. That is a matter dealt with by S. 418. Section 423 merely prescribes the different reliefs that the appellate

d Court may grant after entertaining an appeal and investigating matters in the manner prescribed and limited by S. 418.

I now turn to consider the powers of this Court on revision; there also the distinction between the two classes of powers is maintained; S. 435 deals with the first class of powers and S. 439 with the second. Section 435 says that this Court may call for the record of any proceeding before any inferior criminal Court situate in the local limits of its jurisdiction

"for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of such inferior Court."

The words used are very wide. The Court

may enquire into matters in order to satisfy itself as regards "correctness, legality, propriety and regularity." In satisfying itself whether the order or sentence is "legal," or whether the proceedings have been conducted with "regularity," it will consider mainly questions of law. In satisfying itself whether the order or sentence is "correct" and "proper" it will consider mainly questions of fact. This is the scope of this Court's revisional jurisdiction conferred by statute. Some of the reliefs which the High Court on revision may grant and those which it may not grant are mentioned in S. 439; but what the Court may investigate or entertain in order to determine whether or not it will grant any of these reliefs is not limited in this section. The scope of the Court's investigation is to be found in S. 435; and there is nothing in that section or any other section in the Code which says that in the case of trials by jury this Court in revision will not entertain a question of fact in granting relief. Section 439 (1) says that this Court in revision may

"in its discretion exercise any of the powers conferred on a Court of appeal by Ss. 423, 426, 427 and 428, etc."

This means that this Court on revision may in its discretion grant any of the reliefs mentioned in these sections. Section 439 (1) nowhere says that in granting these reliefs this Court on revision cannot entertain any ground except those which the appellate Court may entertain. As I have tried to show before, sub-s. (2) of S. 423 is merely explanatory of the effect of S. 418 upon sub-s. (1) of S. 423. As S. 418 is applicable only to appeals and not to revisions, sub-s. (2) of S. 423 will have no application to revisions. I may in this connexion mention that S. 439 (1) by no means exhausts all the reliefs that this Court on revision may grant. It would be tedious to enumerate the number of other reliefs which

g this Court on revision may grant and which are not contemplated in any of the sections 423, 426, 427 and 428, e. g., it may interfere with interlocutory orders of all kinds and set them aside although this may not involve reliefs contemplated in the above sections; it may quash proceedings on the ground that they are mala fide and constitute an abuse of the process of the Court; it may direct a further inquiry into a complaint dismissed by a Magistrate under S. 203.

The powers of the revisional Court are therefore not bounded by S. 439 (1). That section merely empowers the revisional Court to pass at its discretion any of the orders which an appellate Court may pass under the sec-

a tions mentioned therein. It does not limit the powers of this Court to the passing of those orders only; nor does it limit the scope of the Court's investigation. The powers of the revisional Court are to be ascertained by reading S. 435 together with S. 439. Section 435 expressly says that the Court may send for any record of an inferior Court "to satisfy itself as to the correctness, legality and propriety of a finding, sentence or order or the regularity of a proceeding." The matters enumerated in S. 435 which this Court may investigate necessarily include matters of fact and there is no section corresponding to S. 418 limiting the scope of this investigation regarding cases b tried by jury to points of law only. Section 439, in my opinion, merely prescribes some of the reliefs this Court may or may not grant when exercising its revisional powers after investigating matters mentioned in S. 435. My learned brother Khundkar has said that by an unwavering practice in these matters we have precluded ourselves, when exercising our revisional jurisdiction, from setting aside a verdict of the jury except on a point of law. If the statute which gives us our powers has not thus curtailed them we should not, and indeed cannot, by practice, do so. I would c resist any unauthorised curtailment of our powers with the same relentlessness whether the attempt comes from without or from within.

When no limits are placed by the Legislature on our powers or discretion they should be left untrammelled. For reasons of convenience we may follow a certain practice in the exercise of such powers on discretion, but we must never allow such practice to become an inflexible rule. We must not bind ourselves with chains of our own forging. No practice, however, long and however invariable, can take away anything from what has been d given to us by statute. I would say, with respect, that the maxim "*cursus curiæ est lex curiæ*" which is relied upon by my brother Khundkar for the view that we have curtailed our powers in revision by our practice cannot be invoked to take away or add to our powers when these powers have been defined by statute. The argument of the Crown is that this Court on revision cannot interfere with the verdict of a jury on a point of fact as the Code of Criminal Procedure by S. 439 (1) has prohibited this Court on revision from interfering with the verdict of a jury on any ground which is not available to this Court on appeal. I would have accepted this view if I could have accepted the Crown's interpretation of S. 439 (1), but I must say with respect, that I cannot

concur with my brother Khundkar's opinion e that although S. 439 (1) does not fetter this Court in the way suggested by the Crown, the Court is nevertheless powerless to interfere with the verdict of a jury except for an error of law because of our invariable practice. In this connexion I can do no better than quote the observations of Jenkins C. J. in 41 Cal. 446³⁴ at page 457 :

"When a tribunal, it has been said, is invested by Act of Parliament or by Rules with a discretion, without any indication in the Act or Rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view to indicating the particular grooves in which the discretion should run, for if the Act or Rules did not f fetter the discretion of the Judge why should the Court do so? ((1885) 29 Ch. D. 50³⁵ at p. 58). And in the same spirit we find Lindley L. J. declaring 'It appears to me wrong in principle for any Court or Judge to impose fetters on the exercise by themselves or others of powers which are left by law to their discretion in each case as it arises:' (1897) L. R. 1897 P. 89³⁶ at p. 95."

Again in 28 Bom. 533²³ this is what Jenkins C. J. says at page 566 :

"The powers of the High Court are defined by the Code of Criminal Procedure : and it is there that we must go to learn what its powers are. Section 435 empowers the High Court to call for and examine the record of any proceeding before any criminal Court situate within the local limits of its jurisdiction for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court. g

Then by S. 439 it is provided that in the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by Ss. 195, 423, 426, 427 and 428 or on a Court by S. 338.

The Legislature could not have expressed itself with greater clearness, but it has been suggested that the Courts have imposed on the plain terms of these sections a gloss which narrows scope of the discretion vested in the High Courts. h

If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion, and whenever it is argued that judicial decision has deprived us of the power that the Legislature has given us I recall the words of an eminent English Judge. 'I desire to repeat,' he said 'what I have said before, that this controlling power of the Court is a discretionary power, and it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances which vary greatly. For myself I say emphatically that this dis-

34. ('14) 1 A. I. R. 1914 Cal 597 : 22 I. C. 321 : 15 Cr. L. J. 49 : 41 Cal 446 (S.B.), In re an attorney.

35. (1885) 29 Ch. D. 50 : 54 L. J. Ch. 762 : 52 L. T. 395 : 33 W. R. 470, Gardner v. Jay.

36. (1897) L. R. 1897 P. 89 : 66 L. J. P. 57 : 77 L. T. 330 : 45 W R 583, Saunders v. Saunders.

^a cretion ought not to be crystallized as it would become in course of time by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of the discretion, which the Legislature has committed to them. This discretion, like all other judicial discretions, ought as far as practicable to be left untrammelled and free so as to be fairly exercised according to the exigencies of each case.'

These weighty words appear to me to breathe the spirit that should guide us in the exercise of our discretionary powers of revision. This may perhaps increase our responsibilities and add to our labours, but no one would shirk the one or grudge the other."

In this case there was a difference of opinion between two Judges. One of them Ashton J. held the view that the High Court, exercising ^b its power of revision under S. 439, Criminal P. C., will not disturb a conviction on the ground that it is wrong on facts. He based his view on the rule of practice adopted by the Court in dealing with revisions. This revision was from two concurrent findings of facts and Ashton J. held that to interfere with a finding of fact in such a case would virtually amount to giving an accused person the right of a second appeal, Chandavarkar J. held a contrary view and Jenkins C. J. in upholding the decision of Chandavarkar J. and setting aside the conviction, made the above observations. I hold that this Court, on revision, may set ^c aside the verdict of a jury on the ground that it is wrong on the facts, even though the erroneous verdict is not due to any misdirection by the Judge or misunderstanding by the jury of the law as laid down by the Judge and although there is no other error of law. In my opinion, there is nothing in S. 439 (1) which limits our powers in revision to those exercisable in appeal. Even if this interpretation of S. 432 (1) be not correct, I would still hold that when a convicted person shows cause against his conviction by taking advantage of the provisions of sub-s. (6) of S. 439, he can ask the Court to set aside the verdict of a jury on the ^d ground that it is wrong on the facts. Sub-section (6) is as follows :

"Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-s. (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction."

A person whose sentence is sought to be enhanced is given the right to "show cause against his conviction." It is not said that he can show cause only on a ground of law when the trial is by jury. He may show cause on any ground. There is no section corresponding to S. 418, which section applies in terms only to appeals. If a convicted person is given these extensive rights, this Court hearing the cause

shown under sub-s. (6) must be presumed to have the corresponding extensive powers unless there is some provision curtailing such powers. Conceding, for the sake of argument, that sub-s. (1) of S. 439, does limit the powers of this Court on revision to the powers given to this Court on appeal in other cases, this limitation would not apply to an investigation under sub-s. (6) as the sub-section begins with the words "Notwithstanding anything contained in this section." This means that if anything in the other parts of the section could be read as curtailing the right given in this sub-section to a convicted person showing cause against his conviction, that part of the ^f section must be taken as not applying to sub-s. (6). If therefore there are limitations in sub-s. (1) of S. 439, they would not apply to persons showing cause under sub-s. (6). The Crown argued that the words "notwithstanding etc.," referred only to sub-s. (5) and all that it meant was that in spite of sub-s. (5) a convicted person who had not appealed may show cause against his conviction. I see no reason to limit the application of the words "notwithstanding anything contained in this section" to sub-s. (5) only. If that was intended, nothing could be easier than to say, "notwithstanding anything contained in sub-s. (5)." The words ^g are "notwithstanding anything contained in this section." Anything in any part of the section which conflicts with sub-s. (6) is therefore excluded from application to a person showing cause against his conviction. If sub-s. (1) limits the rights of convicted persons in other revisional applications, it will not limit the rights given by sub-s. (6) as those rights are given in broad and unlimited terms notwithstanding anything contained in the section.

It was argued on behalf of the Crown that there is no reason why a person found guilty by a jury and showing cause against his conviction by availing himself of the provisions ^h of S. 439 (6) should be in a better position than a person appealing against a verdict of the jury. It is not safe to speculate as to why different rights have been given. We are to gather the intention of a statute by giving the words used their ordinary meaning. We are not to speculate regarding the motives of the legislature. I may however hazard a reason for this difference. In an appeal from a trial by jury the Court has not come to its own finding on facts. It need not decide what facts should be believed and what not. All it has to do is to see whether all the facts have been fully and fairly placed before the jury. When a Court has to decide whether a sentence passed should be enhanced, it must go into

a facts and decide what facts it should believe and what facts it should not. More often than not it will not have any assistance from the verdict of the jury on these facts as the jury does not give its findings on every set of facts. In deciding these matters the Court will very often come to a conclusion on facts regarding the guilt or innocence of the accused. If in a case it comes to the conclusion that the verdict of the jury is wrong on facts and is yet unable to set aside the verdict the Court will be in an embarrassing position. It may be that sub-s. (6) was framed in this manner in order to prevent the Court being put in this embarrassing position.

I would answer the question put to us by saying that when a person convicted of murder and sentenced to transportation for life shows cause against his conviction by taking advantage of the provisions of S. 439 (6) he may demand that the verdict of the jury be altered, reversed or set aside on the ground that it is wrong on facts even though there has been no misdirection by the Judge or misunderstanding by the jury of the law as laid down by the Judge or any other error of law. I would add that a convicted person would have this right not only in cases of murder but in every case.

c R.K. *Reference answered.*

A. I. R. (31) 1944 Calcutta 39

HENDERSON AND AKRAM JJ.

Abdul Jabbar Molla and others
Complainants—Appellants
v.

Emperor.

Criminal Appeal No. 586 of 1942, Decided on 26th May 1943.

(a) Evidence Act (1872), S. 24 — Confession at instigation of police is inadmissible.

d A confession which must have been made at the instigation of the police should not be submitted to the jury at all. [P 40b]

(b) Criminal P. C. (1898), S. 418 — Jury has to decide whether identification evidence is satisfactory—Direction by Judge to reject such evidence — Jury still convicting — High Court cannot interfere with verdict.

It is purely for the jury to say whether they were satisfied with the evidence of test identification, and if they convict the accused in spite of the very strong view taken by the Judge that they ought to reject it, it is impossible for the High Court to interfere with this verdict. [P 40d,e]

Cr. P. C. —

(41) Chitaley, S. 418, N. 2, Pt. 1 and S. 299, N. 2, Pt. 11.

(41) Mitra, S. 299 'Question of fact;' S. 418 'Trial by jury.'

(c) Penal Code (1860), Ss. 395, 412 and 411— Articles found in possession of accused—They cannot be convicted under Ss. 395 and 412—If inference of particular person being dacoit drawn, conviction under S. 395 natural — In absence of knowledge of dacoit to individual accused conviction can be under S. 411 and not under Section 412.

It is quite meaningless to convict the accused both under S. 395 and under S. 412 with regard to the evidence about the finding of certain articles in their possession. If the jury are prepared to draw an inference from the fact that particular person is thief there would be no difficulty in convicting him under S. 395, it having been proved that the actual property was stolen in the course of a dacoity. If they are not so satisfied, the position becomes very different there being no evidence from which a jury could be asked to say that these individual accused knew or had reason to believe that the stolen properties were transferred by the commission of dacoity. If the charge under S. 395 fails, the only alternative would be one under S. 411. [P 40e,f]

Penal Code —

(40) Ratanlal, Page 1039, 'Possession.'

(36) Gour, Page 1413, Para. 4960.

Sudhansu Sekhar Mukherjee, amicus curiæ.

Nirmal Chandra Chakravarty — for the Crown.

Henderson J. — All the appellants have been convicted of dacoity and in addition to that the first five appellants have been convicted of an offence punishable under S. 412, Penal Code. Their appeal is from the jail. The learned Judges presiding over the undefended Bench thought that this was a case in which the appellants should have some assistance, and at their request Mr. Mukherjee has been good enough to argue the appeal as an amicus curiæ on their behalf. I need hardly say that we are extremely grateful to him for so doing. The evidence is of the type which one usually finds in these cases. In the first place, there is a confession made by appellant 1. There is evidence of identification supported by a test identification; finally there is evidence that some of the stolen property was recovered from the houses of individual appellants.

The only evidence of any value against appellant 1 is this confession. Mr. Mukherjee has contended that this was inadmissible in evidence, and ought not to have been allowed to go to the jury at all. After examining the circumstances in which it was made we have no hesitation in accepting that contention. There is a ring of truth about the explanation given by this appellant in the statement which he made under S. 342. This appellant is a professional criminal of such notoriety that he is what is known as a C. T. Act Dagi. As such he has to pay periodical visits to the thana. He paid one of these visits the day before his confession was recorded. The police ar-

^a rested him. He was taken to Narayanganj where he was produced before the Magistrate. When questioned by the Magistrate he stated that he was not confessing with any hopes that he would be acquitted or obtain any lighter sentence and so forth. Of course, if such hopes had been given to him, he would certainly not admit it at that time ; but he had to give some explanation of his desire to confess. The explanation was that he had committed a sin but he did not desire to add to his sin by committing the further sin of lying; it was therefore necessary for him to confess and tell the truth.

^b Now, this is not a *crime posionelle*, which sometimes leads to remorse and in connexion with which a genuine confession may very easily be made. I am bound to say that I am always rather sceptical when the result of an interview between a professional criminal and a police officer is a sudden desire to confess. I have no doubt whatever that the explanation of penitence and a sudden dislike to lying is not a true explanation. The inevitable result is that this confession must have been made at the instigation of the police. It should, therefore, not have been submitted to the jury at all.

^c There is also another practical difficulty with regard to it. It always seems to be assumed that a confession relates to the particular offence charged and that the persons named in it are the other accused. Here there is absolutely nothing to connect the names mentioned in the confession with the other accused persons. Neither their fathers' names nor their residences are given. There is nothing to connect the occurrence with the subject-matter of the charge except the reference to the village Baliapur. When a statement of this kind fails to blossom into an approver's deposition, it really becomes of very little use. ^d It was at any rate essential that evidence should have been given that no other dacoity was committed about that time in this particular village. It might then have been inferred that this statement refers to the present occurrence.

The appellants Jamira and Abdul Hakim have been identified by inmates of the house. They were also picked out by these witnesses at a test identification. The learned Judge did his best to persuade the jury to reject this evidence. He certainly viewed the test identification with suspicion and he was very doubtful whether the witnesses would be in a position to identify any of the dacoits. It was purely for the jury to say whether they were satis-

fied with this evidence, and they convicted in spite of the very strong view taken by the learned Judge that they ought to reject it. It is impossible for us to interfere with this verdict.

The other appellants have been convicted solely upon evidence with regard to the finding of certain articles in their possession. The verdict which the jury have brought in shows that they were in some muddle. It is quite meaningless to convict them both under S. 395 and under S. 412 with regard to this evidence. The learned Judge did not make it sufficiently clear that it was a matter of evidence whether they would infer from the fact of possession that a particular appellant was one of the thieves. If the jury were prepared to draw such an inference there would, of course, be no difficulty in convicting under S. 395, it having been proved that the actual property was stolen in the course of a dacoity. If they were not so satisfied, the position becomes very different because there was no evidence from which a jury could be asked to say that these individual appellants knew or had reason to believe that the stolen properties were transferred by the commission of dacoity. If the charge under S. 395 failed the only alternative would be one under S. 411. ^g

The evidence both with regard to the identity of these very common articles and with regard to the alleged exclusive possession of these individual appellants is so scanty and unsatisfactory that we do not think that we should be justified in directing a re-trial.

The result is that we uphold the convictions and sentences of the appellants Jamira and Abdul Hakim under S. 395, Penal Code, and set aside the conviction and sentence under S. 412, Penal Code. In the case of the other four appellants their convictions and sentences are set aside and they will be set at liberty immediately. ^h

Akram J. — I agree.

R.K.

Order accordingly.

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LODGE J.

Muzafar Ahmed—Defendant No. 5

— Appellant

v.

Indra Kumar Das and others

— Respondents.

Appeal No. 591 of 1940, Decided on 19th February 1943, from appellate decree of Sub-Judge, Noakhali, D/- 22nd December 1939.

^a (a) Bengal Wakf Act (13 of 1934), S. 70 — Appeal is not incompetent without Commissioner — Decree is not void but only voidable.

The provisions of S. 70 do not mean that an appeal is not competent without the Commissioner of Wakfs being made a party, and the decree in the appeal to which he is not made a party is certainly not void. It is only voidable. [P 41g,h]

(b) Bengal Wakf Act (13 of 1934), S. 70 — "Suit or proceeding" — Appeal.

The words "suit or proceeding" in S. 70 (1) do not include an appeal: ('36) 23 A. I. R. 1936 Cal. 480, *Followed*. [P 42a]

Syed Nauser Ali, Khondkar Mohammad Hasan and Obaidul Huq — for Appellant.

Atul Chandra Gupta and Radhika Ranjan Guha — for Respondents.

^b *Azizul Islam* — for Commissioner of Wakfs.

Judgment.—The plaintiffs in the suit out of which this appeal arises prayed for a declaration of their raiyati right in certain lands and for khas possession of the same after demolishing certain huts, which were situated thereon. The suit was contested by defendant 5 only. This defendant asserted that some of the lands formed part of a wakf property which had been dedicated by his ancestor, Md. Sami, by a deed dated Agrahayan 17, 1272 B.S., and the substantial question in issue between the parties in the ^b suit was whether the lands in question were wakf property or not. In the Court of first instance notice was served upon the Commissioner of Wakfs after written statement of defendant 5 has been filed. After a number of adjournments the Commissioner of Wakfs appeared on 26th November 1938, by a vakalatnamah and applied for time for filing a written statement. Time was allowed for this purpose and the learned Munsif reserved his decision on the question whether the Commissioner of Wakfs was a necessary party or not. Subsequently, the Commissioner of Wakfs filed a written statement. He did not apply ^d formally to be added as a party to the suit. His name was not entered in the plaint as a party and certainly so far as the form of the suit was concerned he was not made a party. The learned Munsif came to the conclusion that the property was wakf property, and he ordered that the suit be dismissed on contest with costs against defendant 5 and ex parte against the rest. Against that decision the plaintiffs appealed. The Commissioner of Wakfs was not made a party to the appeal, and no notice of the appeal was served upon him. The learned Subordinate Judge who heard the appeal came to the conclusion that the property was not wakf property, and he ordered that the appeal be allowed with costs throughout, and that the

judgment and decree of the lower Court be set aside and the suit decreed in full. The contesting defendant, that is defendant 5, preferred a second appeal to this Court. At the time of the hearing of the appeal under O. 41, R. 11, that is on 22nd November 1940, the learned advocate for the appellant was permitted to add two grounds of appeal. Those two grounds are as follows:

"13. For that the appeal to the lower Appellate Court was incompetent inasmuch as the Commissioner of wakfs was not made a party to the appeal and no notice of the appeal was served on him.

14. For that the decree of the Munsif could not have been reversed in the absence of the Wakfs Commissioner or without serving any notice of the appeal on him."

The record shows that notice of this second appeal was issued to the Commissioner of Wakfs and was served upon him in March 1941. The Commissioner of Wakfs appeared in this Court on 13th January 1943. Mr. Nausher Ali for the appellant has contended that the learned Subordinate Judge was not competent to hear the appeal and to dispose of it without the Commissioner of Wakfs being made a party to the appeal. It is obvious from what I have said above that the Commissioner of Wakfs was not made formally a party to the suit. Therefore unless S. 70, Bengal Wakf Act of 1934 was applicable to ^g the appeal it was not essential for the Commissioner of Wakfs to be made a party to the appeal. Even if the Commissioner of Wakfs ought to have been given notice of the appeal, it appears that S. 70 (4), Wakf Act, provides the remedy in such a case. Section 70 (4) reads:

"In the absence of a notice under sub-s. (1) any decree or order passed in the suit or proceeding shall be declared void, if the Commissioner, within one month of his coming to know of such suit or proceeding applies to the Court in this behalf."

It is obvious from this that the decree or order passed in the suit or proceeding is not void but voidable, and the Commissioner must apply within one month of his coming ^h to know of the suit or proceeding. It is apparent from what I have stated above that the Commissioner of Wakfs came to know of the proceedings of the Appellate Court certainly as early as March 1941, and apparently no steps have yet been taken under S. 70 (4), Bengal Wakf Act. In my opinion the provisions of S. 70 do not mean that the appeal was not competent without the Commissioner of Wakfs being made a party, and the decree in the appeal is certainly not void. Mr. Gupta for the respondents has drawn my attention to the ruling in 40 C. W. N. 816,¹ in which it

1. ('36) 23 A. I. R. 1936 Cal. 480 : 166 I. C. 212 : 40 C. W. N. 816 : I. L. R. (1937) 1 Cal. 77, Commissioner of Wakfs, Bengal v. Mahmuda Bibi.

a was held that the words "suit or proceeding" in S. 70 (1), Bengal Wakf Act, do not include an appeal. That decision is binding on me being a decision of a Division Bench and, therefore, if it were necessary, I should hold that S. 70 does not apply to the appeal before the lower Appellate Court. In the result, therefore, I hold that the two added grounds, to which I have referred above, are not good grounds for allowing this appeal.

Ground No. 6 of the grounds of appeal to this Court reads as follows:

b "For that in the total absence of evidence that the value of the raiyati in dispute in 1272 B.S., was one hundred rupees or more, the learned lower Appellate Court erred in law in holding that Ex. B required registration under the Indian Registration Act."

Exhibit B was the document by which the wakf was said to have been created. The question whether it was admissible in evidence was the vital question in the suit. Mr. Nausher Ali for the appellant after referring to the document has conceded that he cannot now support the argument set out in ground No. 6, and that under the Registration Act the deed was compulsorily registrable. No other ground of appeal has been argued before me. In the result the appeal fails and must be dismissed with costs to respondents *c* on record.

K.S.

Appeal dismissed.

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AKRAM AND PAL JJ.

*Woomesh Chandra Datta Chowdhury —
Plaintiff — Appellant
v.*

Jabed Ali and others — Respondents.

Appeals Nos. 384 and 385 of 1940, Decided on 26th January 1943, from appellate decrees of Addl. Dist. Judge, Bakerganj, 3rd Court, Barisal, D/- 5th August 1939.

d (a) Civil P. C. (1908), Ss. 2 (11) and 50—Decree against deceased obtained during his life—Execution of — Sons and not executors under deceased's will made parties—No allegation as to sons not being in possession or intermeddling with deceased's property — Auction sale held passed property to purchaser.

D died leaving a will and two sons *H* and *R*. By his will he appointed his son *H* and one *N* as joint executors. *L* who had obtained a rent decree against *D* during his lifetime put the same into execution after *D*'s death making his two sons parties to the execution proceedings as his legal representatives. The property was sold before the executors of *D* obtained the grant of the probate of the will. It was contended that as the executors of the will of *D* were not made parties to the proceeding in execution of the decree for rent, the property did not pass to the auction purchasers by the auction sale:

Held that as the only plea taken was that in law the property did not vest in the sons and it was not

even alleged that the two sons were not in possession of the estate of the deceased, that they did not intermeddle with the estate of the deceased, the auction sale passed the property to the auction purchaser: 4 Cal. 342, *Approved*; 6 I. C. 627 (Cal.), *Expl.* [P 43f,g]

C. P. C. —

('40) Chitaley, S. 50, N. 14, Pt. 3.

('41) Mulla, Page 213 Note "Legal representative;" Page 12 Note "Intermeddles . . . estate."

(b) Landlord and tenant—Decree for rent — Execution of—Holding sold—Effect of on relation between landlord and tenant — Decree in respect of old relationship cannot operate as *res judicata*.

When a holding is sold away at the instance of the landlord himself in execution of his decree for arrears of rent in respect of it, the old tenancy right of the tenant ceases to exist. If he succeeds in remaining in possession as against the auction purchaser, or in regaining possession, the old relationship between the landlord and himself does not thereby revive. It would be a new legal relation between the parties constituted by a new set of facts. The decision in respect of the old relationship would not debar the issue in respect of this new legal relation.

[P 43h; P 44a]

C. P. C. —

('40) Chitaley, S. 11, N. 14.

('41) Mulla, Page 43 Note "B. Both suits . . . liability."

*Jitendra Nath Guha and Satya Priya Ghose —
for Appellant.*

Pal J.—These appeals are by the plaintiff *g* in a suit for recovery of arrears of rent of two under-tenures. Admittedly these two under-tenures were held by the defendants under a tenure owned by one Durga Charan Guha Thakurta. Durga Charan died in October 1920, leaving a will and two sons, Haran and Rajendra. By his will he appointed his son Haran and one Nibaran Chandra Ghosh as joint executors. The executors applied for the probate of the will and on 26th February 1921, the application was allowed. The executors however did not obtain the grant of the probate till 20th January 1925.

The landlords of Durga Charan's tenure *h* had instituted a suit for recovery of arrears of rent of the tenure against Durga Charan during his lifetime and obtained a decree in that suit before his death. They took out execution of this decree after his death making his two sons parties to the execution proceeding as his legal representative, and in this execution case put the tenure to sale under Ch. 14, Ben. Ten. Act. The sale was held on 3rd February 1923, and some Sarkars were the auction purchasers. It may be noticed that Haran, one of the executors, was party to this execution proceeding; but no objection was taken to the execution on the ground that Durga Charan left a will and that his two sons were not his legal

a representatives. After this sale and before obtaining the grant of the probate the executors of the will of Durga Charan sold the tenure to one De Cilva on 13th June 1924. Later on, the plaintiff purchased the tenure from De Cilva. The claim for rent in the present suit relates to the period from Baisakh 1341 B. S. to Poush 1344 B. S. (i. e. April 1934 to January 1938).

Defendants 1, 4, 12, 19 (ka) and 24 contest the claim. Their defence inter alia is (1) that the plaintiff acquired no title to the tenure by his purchase, (2) that there is no relationship of landlord and tenant in respect of the b under-tenure between the plaintiff and the defendants, and (3) that the Sarkars, the auction purchasers of the tenure, were their landlords and they realised rent for the period from the defendants. It transpired in evidence that on two previous occasions the plaintiff obtained two decrees for arrears of rent of this under-tenure against these defendants in his rent suits Nos. 750 of 1925 and 126 of 1929. The Sarkars were no parties to these suits. The plaintiff contends that so far as the present defendants are concerned these decrees would bar the issue as to relationship of landlord and tenant between the plaintiff c and the defendants by the principle of res judicata. It appears that the Sarkars also obtained a decree against these defendants in their rent suit No. 137 of 1931 without impleading the plaintiff as party in that suit. The defendants contested the claim of the Sarkars up to this Court but ultimately failed. The learned Munsif dismissed the suit holding that no relationship of landlord and tenant subsisted between the parties in respect of the disputed jamas. He found that the under-tenure of the defendants was sold away in 1930, in execution of the plaintiff's decree in his rent suit No. 126 of 1929, and that as d the result of this sale the relationship of landlord and tenant between the plaintiff and the defendants, even if it ever existed, came to an end. On appeal by the plaintiff, the learned Additional District Judge held that the two sons of Durga Charan fully represented the tenure in the execution proceeding and consequently by the sale held in the execution proceeding in question the tenure itself passed to the Sarkars. The plaintiff's vendor De Cilva and the plaintiff by his purchase from De Cilva therefore acquired no title to the tenure. He therefore affirmed the decision of the Court of first instance.

Mr. Guha appearing for the appellant before us contends (1) that as the executors of the will of Durga Charan were not made

parties to the proceeding in execution of the decree for rent of the tenure, the tenure did not pass to the Sarkars by the auction sale, held on 3rd February 1923; (2) that the plaintiff having derived title from the executors is the owner of the tenure under which the defendants hold their under-tenure and; (3) that at any rate after the decree in his previous rent suits the defendants are debarred from denying the relationship of landlord and tenant between the parties.

In support of his first point Mr. Guha strongly relies on the decision in 12 C. L. J. 561¹ (Brett and Richardson JJ.). In the case before us the decree for arrears of rent of Durga Charan's tenure was obtained by his landlords during his life-time. The execution of that decree was taken out after his death. Section 50, Civil P. C., entitled the decreeholder to execute the decree against the legal representative of the deceased. Section 2 (11) of the Code defines the expression "legal representative" to mean a person who in law represents the estate of a deceased person, and to include any person who intermeddles with the estate of the deceased. The two sons of the deceased tenure-holder judgment-debtor were made parties in the execution proceeding as the legal representatives of the deceased. The only plea taken by the plaintiff in the present case is that in law the tenure did not vest in them. It is not even alleged that these two sons were not in possession of the estate of the deceased, that they did not intermeddle with the estate of the deceased. The very decision relied on by Mr. Guha makes a distinction in favour of such an occasion and distinguishes the decision in 4 Cal. 342² on that ground. In our opinion the plaintiff has not in this case succeeded in showing that the prior sale of 3rd February 1923, did not pass the tenure to the Sarkars.

As regards the third contention of Mr. Guha the view taken by the learned Munsif must be upheld. The under-tenure was sold away at the instance of the plaintiff himself in execution of his decree for arrears of rent in respect of it. After that the old tenancy right of the defendants ceased to exist. If they succeeded in remaining in possession as against the auction purchaser, or in regaining possession, the old relationship between the plaintiff and themselves did not thereby revive. It would be a new legal relation between the

1. ('10) 12 C. L. J. 561 : 6 I. C. 627 : 14 C. W. N. 1041, Harish Chandra Biswas v. Puridas Das.

2. ('79) 4 Cal. 342 : 3 C. L. R. 154, Prosunno Chunder v. Kristo Chytunno.

a parties constituted by a new set of facts. The decision in respect of the old relationship would not debar the issue in respect of this new legal relation. The defendants have shown that since then the tenure has been in the possession of the Sarkars and they have been realising the rent of the under-tenure from the defendants. In the result these appeals fail and are dismissed. As there has been no appearance before us by the defendants we make no order for costs.

Akram J. — I agree.

G.N. *Appeals dismissed.*

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RAU AND BISWAS JJ.

*Smt. Khatun Jinnat Sahebani w/o Rehan-
uddin Patari and another—Plaintiffs
— Appellants*

v.

*Isha Prokash Gangooli and others —
Respondents.*

Appeal No. 185 of 1940, Decided on 6th April 1943,
from appellate decree of Sub-Judge, Noakhali, D/-
29th September 1939.

**Bengal Tenancy Act (8 of 1885, as amended in
1938), Sch. 3, Art. 3 — Dispossession need not
c be by landlord qua landlord.**

The dispossession contemplated in Art. 3 of Sch. 3 is not dispossession by a person who was the plaintiff's landlord at the date of the dispossession; it should be sufficient if the dispossession was by the landlord of the holding of which the plaintiff seeks to recover possession. The dispossession need not be by landlord qua landlord : ('36) 23 A. I. R. 1936 Cal. 299 and ('42) 29 A. I. R. 1942 Cal. 611, *Approved*; 63 Cal. 503, *Dissent*; ('30) 17 A. I. R. 1930 Pat. 256 (F.B.), *Ref.* [P 46a,b]

[Amendment suggested.]

Jitendra Kumar Sen Gupta—for Petitioners.

Hiralal Chakravarty and Kshetra Mohan Chatterjee — for Respondents.

Rau J. — This appeal is by the plaintiffs
d in a suit brought by them for recovery of possession of a raiyati holding. The holding originally belonged to one Ana Mia, who held it, as to 12 annas, under defendants 1 to 3, and as to the remaining 4 annas, under defendant 17. After Ana Mia's death, by successive devolutions, 7 annas odd of the raiyati interest passed to defendant 11 and 4 gundas odd to defendant 9. On 19th May 1922, plaintiff 1 purchased the interest of defendant 11. This was before raiyati holdings were transferable under the Bengal Tenancy (Amendment) Act of 1928. Then, on 25th January 1930—after the aforesaid Act—plaintiffs 1 and 2 purchased the interest of defendant 9. Under the raiyati holding, plaintiff 2 and one Aminulla had the entire under-raiyati interest, and they were in pos-

session through certain bargadars who had executed kabuliyats in their favour. In 1931, defendants 1 to 3 brought a rent suit against defendants 4 to 14 (making defendant 17 a pro forma defendant) on the footing that they were the entire body of raiyats. On 29th July 1931, they obtained a decree against defendants 4 to 14, and on 10th February 1932, they purchased the holding in execution. On 30th July 1933, they served a notice under S. 167, Bengal Tenancy Act, on Aminulla for annulling the under-raiyati interest. On 25th July 1934, they got a decree for ejectment against Aminulla and some of the bargadars. On 12th May 1935, they took possession of the land through the f Court and took kabuliyats from some of the bargadars who were in possession. On 26th July 1937, the plaintiffs brought the present suit for a declaration that their interests were not affected by the proceedings in the rent suit and for recovery of possession.

The Munsif who tried the suit found (1) that defendants 1 to 3 were bound to recognise plaintiffs 1 and 2 as their tenants having been duly notified of the purchase of 1930; (2) that as these plaintiffs were left out of the rent suit, the decree of 1931 obtained by defendants 1 to 3 was merely a money decree; (3) that the sale in execution of the decree passed only the g right, title and interest of the defendants in the rent suit; (4) that the rights of the plaintiffs under the purchases of 1922 and 1930 were accordingly unaffected by the sale. But he took the view that as regards the second of the two purchases, the plaintiffs' claim to recovery of possession was barred by Art. 3 of Sch. 3, Bengal Tenancy Act. This article prescribes a special limitation of 2 years from the date of dispossession and this suit had been brought more than 2 years after that date. As regards the earlier purchase by plaintiff 1, the Munsif held that since the transfer had not been recognised by the landlords defendants 1 to 3, h the relationship between the parties at the date of dispossession was not that of tenant and landlord; therefore, dispossession in respect of this share of the holding was not by the plaintiffs' landlord and so the special limitation did not apply, the ordinary limitation of 12 years being applicable. Accordingly he decreed this part of plaintiff 1's claim.

In appeal the Subordinate Judge took the view that the claims in respect of both the purchases were barred by limitation. He considered that as the plaintiffs were tenants of defendants 1 to 3 by their purchase of 1930, they were in the position of tenants at the time they were dispossessed of the holding, the same persons could not, he said, be treated as tenants in

^a respect of one share of the holding and trespassers in respect of another. Dispossession in respect of both shares was thus by the landlords and the special limitation prescribed by Art. 3 of Sch. 3, Bengal Tenancy Act, applied. The crucial question in the case is this question of limitation. According to both the Courts below, the dispossession took place in May 1935 (Baisakh 1342 B. S.) and the present suit was brought in July 1937.

Article 3 of Sch. 3, Bengal Tenancy Act, is in the following terms :

^b Description of suit.	Period of limitation.	Time from which period begins to run.
3. To recover possession of land claimed by the plaintiff as a raiyat or under-raiyat.	Two years.	The date of dispossession.

The argument on behalf of the appellants is that dispossession here means dispossession by the landlord as landlord and that dispossession by the landlord through the machinery of the Court, as in the present case, is outside the scope of the article. This contention applies to ^c both the purchases. A further argument advanced is that as regards the purchase of 1922, the dispossession was not by the plaintiffs' landlord at all, as the purchase had not been recognised by defendants 1 to 3. The case law on this subject has not been uniform. All the cases in this Court up to 1927 have been considered in the judgment of a Special Bench of the Patna High Court in 9 Pat. 788¹ and it has been pointed out there that from 1897 to 1913 the current of decision was one way, while the tendency since 1914 has been the other way. The earlier decisions held that dispossession by the landlord through the ^d intervention of the Court was outside the article, while the later tendency has been to hold that it is within the article. Since the aforesaid judgment, there have been at least three more cases in this Court : 40 C. W. N. 135,² following the earlier line; 40 C. W. N. 173³ and 46 C. W. N. 938,⁴ following the later line. In this state of the authorities we might have felt constrained to refer the matter to a Full

Bench, but for the circumstances that S. 48E, ^e Ben. Ten. Act, which was inserted in 1928 and amended in 1938, throws new light on the subject. We must remember that the words in col. 3 of Article 3 of Sch. 3 are merely "The date of dispossession." The words "by the landlord" have been read into the article, because of the limitation imposed upon the provisions of the article by the preamble to the Act, which says that the Act is intended to amend and consolidate certain enactments relating to the law of landlord and tenant, 6 C. W. N. 333.⁵ Accepting this limitation as necessary, let us see how much it implies. It is here that the new S. 48E ^f comes to our aid. The section as amended in 1938 runs :

"When a landlord has ejected an under-raiyat on the grounds specified in cl. (c) or cl. (d) of S. 48C, the under-raiyat may apply to the Court by which the decree for ejectment was passed to be put in possession of the holding from which he was ejected by way of restitution if, within four years of the ejectment, the landlord sublets the holding or any portion thereof; and thereupon the Court may, if satisfied after inquiry that the landlord did not use the land for his homestead, or for cultivation by himself or by hired servants or by members of his family or with the aid of partners, order a recovery of possession on such terms, if any, with respect to compensation to the persons injured as to the Court may seem just."

Let us note the opening words "when a land- ^g lord has ejected." But s. 89 says "No tenant shall be ejected from his tenure or holding except in execution of a decree." Clearly then, the Act regards the landlord as ejecting the tenant even when he does so by process of Court, as he has to; otherwise the opening words of S. 48E would be meaningless. If so, we may legitimately regard the landlord as dispossessing the tenant even when he does so by the machinery of the Courts. In this respect the new provision may be said to have affirmed the tendency of the later, rather than the earlier decisions of this Court. There is another point on which the new ^h section throws some light. Suppose, a landlord, having ejected undertenant A, sublets the holding to B within four years of the ejectment. The section says that in these circumstances, A may recover possession. Now at the time A applies to Court for restitution he is not the tenant of the landlord : B is the tenant. Nor was A the tenant even at the date of the ejectment, for the ejectment was on the ground that the tenancy had already terminated by efflux of time (S. 48C (c)) or already been terminated by notice (S. 48C (d)). What can be said is that the landlord is the landlord of the holding of which A seeks ⁱ

1. ('30) 17 A.I.R. 1930 Pat. 256 : 125 I. C. 565 : 9 Pat. 788 : 11 P. L. T. 197 (F. B.), Gajadhar Rai v. Ramcharan Gope.

2. ('35) 63 Cal. 503 : 40 C. W. N. 135, Gostabehari v. Amiya Kumar.

3. ('36) 23 A.I.R. 1936 Cal. 299 : 163 I. C. 84 : 40 C. W. N. 173, Sheikh Alam v. Atul Chandra Roy.

4. ('42) 29 A.I.R. 1942 Cal. 611 : 204 I. C. 34 : 46 C. W. N. 938, Shashi Kanta v. Nayjan Bewa.

5. ('02) 6 C. W. N. 333, Brojo Kishore Mahapatra v. Saraswati Dassi.

a possession. If such is the position with respect to a provision in the body of the Act, there is no longer any warrant for the assumption that the dispossession contemplated in Art. 3 of Sch. 3 is dispossession by a person who was the plaintiff's landlord at the date of the dispossession; it should be sufficient if the dispossession was by the landlord of the holding of which the plaintiff seeks to recover possession.

b The difficulties on this subject have really been created by case law. Case law, having first inserted the rather vague words "by the landlord" in col. 3 of Art. 3 as being required by the scheme of the Act, then proceeded to interpret the words and sometimes interpreted them with a strictness not warranted by anything contained in the Act. Hence the rule, sometimes followed and sometimes not, that dispossession must be not only by the landlord but by the landlord qua landlord. We venture to think that at least some of the difficulties may be avoided by a more precise formulation of the words which the scheme of the Act can be said to require in Art. 3. We would suggest that the most the scheme of the Act requires is that we should read the entry in col. 3 of Art. 3 as if it ran, "The date of dispossession, provided that the dispossession was by a person who at that date was a landlord of the holding to which the land is claimed by the plaintiff to appertain, irrespective of whether the dispossession was effected directly or through the instrumentality of a Court or otherwise."

d Let us now apply these considerations to the case before us. Here, at the date of the dispossession, defendants 1 to 3 were undoubtedly landlords (along with defendant 17) of the holding of which the plaintiffs claim a share. Further, the dispossession was by these landlords, albeit by the machinery of the Court. Therefore, Art. 3 applies and the suit is barred by limitation, whether in respect of the share purchased by plaintiff 1 in 1922 or the share purchased by plaintiffs 1 and 2 in 1930. The appeal is accordingly dismissed. Each party will bear its own costs in this Court.

Biswas J. — I agree.

R.K.

Appeal dismissed.

A. I. R. (31) 1944 Calcutta 46

AKRAM AND PAL JJ.

Prasanna Dev Raikat — Plaintiff
— Appellant

v.

Bisseswar Dass Gupta and others —
Defendants — Respondents.

Appeal No. 423 of 1940, Decided on 22nd January 1943, from appellate decree of Dist. Judge, Jalpaiguri, D/- 28th November 1939.

(a) Interpretation of statutes—Retrospective operation, when and to what extent given, explained.

No statute shall be construed so as to have retrospective operation, unless its language is such as plainly to require such a construction. So also a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary. A retrospective operation is not to be given to a statute so as to impair an existing right or obligation otherwise than as regards matter of procedure unless that effect cannot be avoided without doing violence to the language of the enactment.

[P 48e,f,g]

C. P. C.—

('40) Chitaley, Preamble N. 3 Pt. 1.

(b) Bengal Tenancy Act (1885, as amended by Act 6 of 1938), S. 75A — Suit for enhancement before 27th August 1937 — Decree after 27th August 1937 but before 18th August 1938 — Appeal pending on 18th August 1938 becomes infructuous temporarily for period till 27th August 1947.

Where a suit for enhancement has been instituted before 27th August 1937 and is decreed after 27th August 1937 but before 18th August 1938 and is pending in appeal on 18th August 1938, the decree of the first Court is rendered inoperative by cl. (2) of the section and will remain inactive for a certain period; hence the appeal also becomes infructuous temporarily for that period. [P 47a,b; P 50c,f]

[Effect of S. 75A explained.]

Apurba Charan Mukherji and Rama Prasad Mookerjee—for Appellant.

Sovendra Madhab Basu and Satindra Nath Roy Choudhury—for Respondents.

Akram J. — This appeal by the plaintiff arises out of a suit for enhancement of rent of a tenure under S. 7, Ben. Ten. Act. The trial Court decreed the suit in part allowing enhancement from 1345 B. S. The defendants therefore preferred an appeal. The lower appellate Court upon a construction put upon S. 75A, Ben. Ten. Act, dismissed the suit, against that decision the plaintiff filed the present appeal. It has been urged before us by the learned advocate for the appellant that the interpretation put upon S. 75A, by the Court below was erroneous and that the suit had been dismissed upon a wrong view of the section; that the decision in 40 C.W.N. 263,¹ referred to by the learned District Judge

1. ('36) 23 A.I.R. 1936 P. C. 49 : 160 I. C. 105 : 15 Pat. 268 : 63 I. A. 47 : 40 C. W. N. 263 (P. C.), K. C. Mukherjee v. Mt. Ram Ratan Kuer.

a had no application to the present case. In our opinion the above contention seems to be correct. Section 75A (i) suspends all provisions of the Bengal Tenancy Act, relating to enhancement of rent for a period of ten years from 27th August 1937, that section came into operation from 18th August 1938, the decree in the suit was passed on 18th November 1937 and signed on 23rd November 1937 i. e., prior to the section coming into force the decree in itself was a valid decree but only was inoperative for a period of ten years from 27th August 1937, under S. 75A (2) (a). When it was appealed against, it was liable to be set aside or modified or confirmed, the appeal Court however could not look into the matter as in the meanwhile S. 75A had been passed, the result therefore should be that the appeal would remain pending so long as S. 75A (1) was in force.

The case in 40 C. W. N. 263,¹ in our opinion has no application to the facts of the present case. In that case there was a change with retrospective effect in the substantive law in respect of the validity of transfers of occupancy holdings by tenants prior to a certain date and under certain circumstances also subsequent thereto and there was no saving clause or exception made in favour of pending suits in which the validity of any transfer was questioned. It was held that the suits were not excluded and were affected by the alteration in the law. Here it is a case merely of suspension of the law with effect from a certain date. The result in my view will be that during the period of suspension the matter cannot be dealt with in appeal. In the above view of the matter we set aside the judgment and the decree of the Court below and direct that the appeal be kept pending during the period that S. 75A (1) remains in force and thereafter disposed of in accordance with law. Parties in this appeal will bear their own costs.

Pal J. — This appeal is by the plaintiff in a suit for enhancement of rent of a tenure under S. 7, Ben. Ten. Act. The suit was instituted on 14th December 1936. The defendants resisted the claim alleging inter alia (i) that the rent of the tenure was fixed in perpetuity and was not liable to any enhancement, (ii) that there existed a customary rate payable by persons holding similar tenures in the vicinity and that no enhancement exceeding this customary rate can be allowed. The learned Subordinate Judge on 18th November 1937, decreed the claim of the plaintiff in part and enhanced the rent from Rs. 86 per annum

to Rs. 627-10-10 per annum with effect from 1345 B. S., (i. e., from 14th April 1938). The defendants preferred an appeal against this decree on 3rd January 1938. During the pendency of this appeal the Bengal Tenancy (Amendment) Act, 1938 (Bengal Act 6 of 1938) was passed which by its S. 21 inserted in the Bengal Tenancy Act, the following sub-heading and section, namely,

"Suspension of provisions relating to enhancement of rent"

75A. (1) All the provisions of this Act relating to enhancement of rent are hereby suspended for a period of ten years with effect from 27th August 1937.

(2) (a) All decrees and orders enhancing rent passed under any of the provisions of this Act on or after 27th August 1937, and before the date of the commencement of the Bengal Tenancy (Amendment) Act, 1938, are hereby declared to be inoperative from the date of such decree or order until the expiry of ten years referred to in sub-s. (1). (b) Any provision providing for enhancement of rent contained in any contract entered into between a landlord and a tenant during the period of ten years referred to in sub-s. (1) is hereby declared to be inoperative during the said period.

(3) Notwithstanding anything contained in this Act or any other law, the period during which a decree, order or contract is rendered inoperative under this section shall not be taken into account in computing any period under the law of Limitation nor in construing the terms of the contract."

This Bengal Act 6 of 1938, came into force on 18th August 1938. On 28th November 1939 the appeal before the District Judge came up for hearing and the learned District Judge allowed the appeal and dismissed the suit solely on the ground that on a proper construction of the new S. 75A (1), Ben. Ten. Act, the claim for enhancement was not maintainable.

Mr. Mukherjee appearing in support of the present appeal before us contends:

"(1) That the suit having been instituted on 14th December 1936, the suspension of the provisions of the Bengal Tenancy Act relating to enhancement of rent by the new S. 75A of the Act did not affect the plaintiff's right to have the enhancement claimed."

(2) That the plaintiff was entitled to have his claim determined according to the provisions of the Act as they stood on 14th December 1936, and that, therefore, the appeal should have been heard and disposed of on the merits by applying the relevant provisions as these stood irrespective of the new S. 75A.

(3) That at the worst the hearing of the appeal might have been adjourned during the period of suspension enacted by S. 75A."

It cannot be denied that the new S. 75A is expressly made retrospective to a certain extent. The section was inserted by Bengal Act 6 of 1938, which came into force on 18th August 1938. Clause (1) is expressly given retroactivity from 27th August 1937. Clause (2) (a), is also made retroactive to a certain extent. It suspends the operation of all decrees and orders enhancing rent passed

a on or after 27th August 1937, and before 18th August 1938 (Act 6 of 1938). Clause (2) (b) is also retroactive in so far as it renders inoperative any contract for enhancement of rent entered into during the period from 27th August 1937 to 18th August 1938.

The question is whether, if the provision of cl. (1) be applied to a suit for enhancement instituted before 27th August 1937, it is given retroactivity and if so, whether such retroactivity can be ascribed to this provision. A law is retroactive if it affects the acts of an individual or things done so as to prevent these from giving rise to or creating a right b allowed by the law of the date on which they are done. Law may not have anything to do with simple hopes or expectations, nor has it anything to do with mere powers granted by the statutes until the fact on which they are based has happened. If and when the fact happens the right is acquired and if a new law is made to affect such fact or right, it is given retroactivity. In this particular case, as soon as the suit for enhancement was filed by the plaintiff he acquired a right to enhancement according to the law of the date on which he instituted that suit. This happened on 14th December 1936. If the Act which came into c force on 18th August 1938, can affect the plaintiff's right to enhancement of rent and his relief in respect of such right sought for in that suit, then the Act operates retrospectively. The question, therefore, is whether such retroactivity can be ascribed to this new law.

We are now considering the effect of Bengal Act 6 of 1938 on a suit instituted before the date, back to which the relevant provision of the Act has expressly been given retroactivity. Section 8, Bengal General Clauses Act (Act 1 of 1899) in giving the effect of repeal of any enactment provides that

d "unless a different intention appears, the repeal shall not (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed, or (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued, or enforced, as if the repealing Act had not been passed."

This provision is identical in terms with section 38 (2) (c) and (e), English Interpretation Act, 1889 (52 and 53 Vict. C. 63) as also with s. 6 (c) and (e), (Indian) General Clauses Act (Act 10 of 1897). There can be no doubt, therefore, that had the relevant provisions of the Bengal Tenancy Act been repealed by the Bengal Act 6 of 1938 with retrospective effect from 27th August 1937, this repeal would not have affected a suit instituted before that date.

The question is whether suspension of the provisions as enacted by that Act makes any difference in this respect. "To suspend" is "to interrupt," "to cause to cease for a time." When certain provisions of a statute are suspended for a certain period, these are, as it were, repealed temporarily for that period. I do not see any difference in principle so far as the question of retroactivity of such repeal or suspension is concerned. It is a fundamental rule of construction that no statute shall be construed so as to have retrospective operation, unless its language is such as plainly to require such a construction. The same rule involves another and a subordinate rule, to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary. A statute is given retrospective effect when it is construed as taking away or impairing any vested right acquired under existing laws.

It is not in accordance with sound principles of interpreting statutes to give them a retrospective effect : 31 I. A. 30² at page 37. Extremely plain language would be needed to deprive of its legal consequences an act done before the passing of a statute. The general rule of law undoubtedly is that except 9 there be a clear indication either from the subject-matter or from the wording of a statute, the statute is not to receive a retrospective construction. In fact, we must look at the general scope and purview of the statute, and at the remedy sought to be applied, and consider what it was that the Legislature contemplated.

"Perhaps no rule of construction is more firmly established than this — that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation otherwise than as regards matter of procedure unless that effect cannot be avoided without doing violence to the language of the enactment."

If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only : (1890) 15 A. C. 384³ at p. 387. That the Legislature has demonstrated an intention to enact retrospectively to a certain extent is not sufficient to warrant a retrospective operation carried beyond the strict meaning of the terms used. The very intent of this rule of interpretation is to prevent interference with rights of property except in cases where the unmistakable language of the

2. ('04) 26 All. 119 : 31 I. A. 30 : 7 O. C. 254 : 8 Sar. 593 (P. C.), Mohammad Abdus Samad v. Kurban Hussain.

3. (1890) 15 A. C. 384 : 15 L. J. P. C. 68 : 63 L. T. 10, Main v. Stark.

a Legislature demands a retrospective construction. The theory of non-retroactivity of laws owes its origin to the needs for security. But there are always two opposing elements to be reconciled—the need for security and the need of promulgating new texts in the interest of social change. It is not surprising that legal science has not yet succeeded in constructing any practical system which will satisfy both. No more than approximations can be discovered. The solutions generally accepted are connected especially with the idea of static security; he who by virtue of an old law has acquired a certain situation of fact should keep it, even if a new law forbids such acquisitions. On the other hand, if an individual is menaced in his dynamic security, he profits no more by the old law. If a person had expected to avail himself of his right, for example, to build on his land, he is at the mercy of any new law regulating construction. He had counted on doing something under the old law; this he can no longer do, and he shall be more or less in the position of one contracting party who sees the other withdraw his promise. But the limit between static and dynamic security is not easy to establish. In the complexity of actual life they contain notions separate or intertwined according to the particular case in view. The theory of non-retroactivity dates from an epoch in which security was the principal consideration. In our day the theory of evolution has deeply impressed our minds, security is less considered, and attention is given to smoothing the way for necessary transformations. Thus, the tendency is to say that a new law should respect the facts of the past, but may dispose of the future at will.

A new law cannot affect acquired rights because they are derived from acts fulfilled under the protection of the old laws. The acquired rights comprehend any permissible act capable of financial valuation exercised over an object which is capable of becoming part of the estate. Every right is an acquired right, which is the resultant of an act, legal when done, although the occasion giving it value has not occurred before the new law, provided that the right by the terms of the law of the time when it was done could have a financial value. It is clear that cl. (1) is not expressly given retroactivity beyond 27th August 1937. The question, therefore is whether there is any clear indication either from the subject-matter or from the wording of the section that it should be given retrospective construction so as to extend its retroactivity to the date of

the suit. There is nothing in the subject-matter of S. 75A, Ben. Ten. Act, which will entitle us in our construction of the section to deviate from the well accepted rules of construction. It is suggested that the object of the new S. 75A is clearly to give exemption to the tenants from any enhancement operating during the period of ten years specified in the section. This object shows that the section was intended to prevent any enhancement operating during this period irrespective of the question when the proceedings for such enhancement were started.

This is really begging the whole question. The section is not expressed in the form of any prohibition to the Courts from decreeing a claim for enhancement. Nor does it by its terms prohibit enhancement of rent. It only says that the relevant provisions shall remain suspended. When a plaintiff institutes a suit claiming some relief in respect of a right, he thereby acquires a substantive right to get the relief determined with reference to the law of the time when he takes this action. The institution of the suit does not give rise to mere hope or expectation but a substantive right as stated above. In my opinion the principle underlying the doctrine of non-retroactivity of a law shall apply to such a case. I cannot see any distinctive feature in the fact that an enhancement when decreed will operate only in the future. Sections 6 to 9, Ben. Ten. Act, deal with the question of enhancement of rent of a tenure and ss. 27 to 37 deal with similar questions in respect of a raiyati. Even assuming that these provisions do not create the right to enhance the rent or the liability to enhancement, but only regulate the relief in respect of an already existing right or liability arising out of the legal relation of landlord and tenant and existing outside those provisions the plaintiff acquired a valuable right to the relief as allowed by the law of the date of his suit by instituting the suit and it will be giving retroactivity to the law repealing or suspending these provisions if such repeal or suspension be allowed to affect that relief. This should be avoided unless the statute expressly assumes that amount of retroactivity or unless that effect cannot be avoided without doing violence to the language of the enactment. There is nothing in the language of the enactment which would compel us to give retrospective effect to it to the above extent.

The enactment is expressly given retroactivity up to a certain date (namely 27th August 1937). The Legislature was evidently conscious of the fact that but for this express

a provision the new law would not be effective from that date. If the Legislature wanted to give it larger retroactivity, there is no reason why it could not give expression to this intention in clear terms. The following positions seem to be clear from the provisions of s. 75A. Ben. Ten. Act : (1) If a suit for enhancement of rent is instituted before 27th August 1937, and also finally decreed before that date, the decree remains in force and is operative. (2) If a suit for enhancement is instituted before 27th August 1937, but is finally decreed during the period from 27th August 1937 to 18th August 1938, the decree remains b inoperative till 27th August 1947. (3) If a suit for enhancement is instituted after 27th August 1937 and is finally decreed before 18th August 1938 the decree remains inoperative till 27th August 1947. (4) If a suit for enhancement is instituted after 27th August 1937, and is pending hearing by the Court of first instance on 18th August 1938, the suit must be dismissed. Section 75A (1) is expressly made retrospective to this extent. But the question is what will happen in the following cases: (1) A suit for enhancement is instituted before 27th August 1937 but is still pending hearing on 18th August 1938. (2) A suit for enhancement c instituted after 27th August 1937, is decreed by the first Court before 18th August 1938 but is pending in appeal on 18th August 1938. (3) A suit for enhancement is instituted before 27th August 1937, and (a) is decreed before that date but is pending in appeal on 18th August 1938, or (b) is decreed after 27th August 1937, but before 18th August 1938 and is pending in appeal on 18th August 1938.

Applying the accepted rules of interpretation as pointed out above, the first of the three cases illustrated above will fall to be decided with reference to the provisions existing at the time of the institution of the suit. d The plaintiff may thus be entitled to have a decree for enhancement. The anomaly that will be created thereby is that there is nothing in the section to render this decree inoperative. Its operation is not suspended by cl. (2) of the section as it is made outside the period covered by the clause. Had the decree been made a few days earlier, namely, before 18th August 1938, it would have been inoperative. This can hardly be the intention of the Legislature.

In the second of the three cases taken by way of illustration it may be within the province of the appellate Court to reopen the decree and dismiss the suit as the provisions are suspended retrospectively so as to cover the date of the suit. For the decree itself be-

ing made inoperative for a particular period, e the appeal itself becomes temporarily infructuous for and during that period. The position in 3 (a) is similar to that involved in the first case above discussed. The case in 3 (b) is the one before us for our consideration. Undoubtedly the decree of the first Court is rendered inoperative by cl. (2) of the section. But the question is how this fact affects the appeal already preferred. If the appeal can be heard, in my opinion, the appellate Court shall have to determine the respective cases of the parties with reference to the law existing at the date of the institution of the suit. This date is outside the period covered by the f express retroactivity of the enactment and I do not see anything in its language which necessarily extends its retroactivity to that date. But as the decree of the first Court has been rendered inoperative by cl. (2) and will remain inactive for a certain period it may be that the appeal has thereby become infructuous temporarily for that period. I feel inclined to this latter view as otherwise there will be this anomaly that though the decree of the first Court, if allowed to stand without any appeal from it, would have been inoperative by reason of cl. (2), the decree of the appellate Court will be fully operative, it g having been made after 18th August 1938 and there being nothing in the section to affect its operation. The Court of appeal below was certainly wrong in dismissing the suit on the ground that the provisions of the Act relating to enhancement of rent were in the meantime suspended. As I have pointed out above, this suspension would not affect any right or liability, any relief in respect of such right or liability or any remedy involved in a suit or proceeding started outside the period over which the statute has extended its retroactivity. I therefore agree that this appeal should be allowed and I concur in the order proposed h by my learned brother.

R.K.

*Appeal allowed.***A. I. R. (31) 1944 Calcutta 50**

HENDERSON J.

Bengal & North Western Railway Co., Ltd.—Defendant 1—Petitioner

v.

*Sobratia Mia s/o Nafi Mia, Plaintiff and another, Defendant 2 —**Opposite Party.*

Civil Rule No. 901 of 1942, Decided on 5th January 1943, issued from judgment and decree of Sub-Judge, Asansol (Burdwan), D/- 28th February 1942.

(a) Railways — Damages—Risk Note "H"—Liability of Railway — Onus — Misconduct — What amounts to.

^a Where goods are consigned under Risk Note "H" the consignor cannot recover damages for deterioration of goods unless he proves misconduct on the part of some servant of the Railway. The mere fact that by the engagement of more coolies than those actually employed the consignment could have been boarded on the earlier connected train does not amount to misconduct: ('36) 23 A.I.R. 1936 Cal. 24 and ('35) 22 A.I.R. 1935 Cal. 811, *Rel. on*; ('30) 17 A.I.R. 1930 Cal. 815, *Not approved*. [P 51g]

In order to claim damages for deterioration of the perishable goods consigned it is not enough for the consignor to prove that the deterioration was due to delay because of misconduct in transit for want of good care on the part of a railway servant. It is further necessary for him to prove that the damage to the consignment was due to such misconduct.

[P 51h]

^b (b) Railways — No Risk Note — Liability of Railway is that of bailee.

In the absence of a Risk Note the liability of the railway is governed by Ss. 151 and 152, Contract Act. Its position is that of a bailee who is bound to take as much care of the goods as a man of ordinary prudence would take of his own goods under similar conditions. [P 52f]

(c) Railways — Risk Note — Proof of.

The fact that the letter "H" is endorsed on the railway receipt and the goods were booked at a lower rate is not sufficient to prove that the goods were consigned under a Risk Note. The execution of the Risk Note must be proved by evidence: ('25) 12 A.I.R. 1925 Cal. 915, *Not approved*. [P 52c,d]

Dr. S. C. Basak and Bhabesh Narayan Bose —
for Petitioner.

^c *Gopendra Nath Das and Jagadish Chandra Ghose* — for Opposite Party.

^a **Order.** — This rule has been obtained by defendant 1. The plaintiff has obtained damages with regard to five consignments of fish. They arrived at their destination at Asansol eight hours late. They had to be transhipped at Mokamah Ghat station. The train arrived late at that station. This was due to the fact that it was detained for 33 minutes at an earlier station in order to attach a saloon in which his Highness the Maharajah of Nepal was travelling. Even so the connecting train had not left Mokamah Ghat: but these consignments of fish were not put on board it and they were actually sent by the next train which arrived eight hours later. It is impossible to deal with all the five consignments on the same basis. The two consignments covered by P. W. B. 5625 and 9224 were also covered by Risk Note "H." The plaintiff therefore cannot recover, unless he proves misconduct by some servant of the railway.

The learned Judge found misconduct with regard to two matters. Firstly, in the detention of the train in order that the saloon of the Maharajah might be attached to it and secondly, in the failure of the clerk at the Mokamah Ghat to tranship the consignments within time. I find it rather hard to follow

the judgment of the learned Judge on the first point. Mr. Das explains that his case really is that a train cannot be detained for more than 10 minutes in order to allow connexion with another train which is running late and that the station master was therefore guilty of misconduct in detaining this train over 33 minutes. The detention was actually made under orders of the Traffic Manager who had given instructions that the saloon of the Maharajah was to be attached to this particular train. Now the plaintiff gave no evidence whatsoever to establish that there were any rules forbidding the detention of a train for more than 10 minutes. Mr. Das has merely to rely upon a statement made in cross-examination by the guard D. W. 10. He merely says: "The authorized time for detention of a train is 10 minutes." He does not explain what he means by the term "authorized." The most that he can possibly mean is that a station master is not entitled to detain trains for this purpose for more than ten minutes. Oral evidence of this kind, of course, is quite useless. There is nothing to show that the Traffic Manager was guilty of misconduct in giving the order which he did. Then in the second place, there is a finding of the learned Judge that this particular misconduct, if it be misconduct, was not the cause of the damage to the plaintiff's fish. ^e

The finding of the Judge on the second point is that if the clerk had engaged more coolies, the consignments of fish would have been put on the connected train at Mokamah Ghat. On this point the learned Judge relies upon certain observations made in the judgment of Suhrawardy and Patterson JJ. in 35 C. W. N. 133.¹ There the proposition is so broadly stated that if it is to be accepted in full, the liability of the Railway Company is exactly the same whether a risk note is executed or not. The true position was pointed out in 61 C.L.J. 526.² The same principle was followed by Lodge J. in A.I.R. 1935 Cal. 811.³ It is quite impossible to hold that on the findings of the learned Judge there was any misconduct on the part of any servant of the petitioner. ^f

With regard to the other three consignments there is a disputed question of fact

1. ('30) 17 A.I.R. 1930 Cal. 815 : 129 I. C. 769 : 58 Cal. 585 : 52 C. L. J. 235 : 35 C.W.N. 133, B. N. Ry. Co. v. Moolji Sicka & Co.

2. ('36) 23 A.I.R. 1936 Cal. 24 : 160 I. C. 728 : 61 C.L.J. 526, Banwari Lal Jagannath v. B. B. & C. I. Ry. Co.

3. ('35) 22 A. I. R. 1935 Cal. 811 : 159 I. C. 907, M. & S. M. Ry. Co., Ltd. v. Ravi Singh Dip Singh & Co.

a whether any risk note was executed or not. The petitioner failed to put these alleged risk notes into evidence. He relies on the fact that the letter H is endorsed on the railway receipts and that the goods were booked at the lower rate. The only direct evidence is to be found in the deposition of the station master D. W. 1. His evidence in chief really supported the plaintiff because he stated that the reduced rate was charged, not because any risk note was signed, but because the goods were perishable. There was however some clumsy cross-examination by which it was elicited that there were risk notes. Now
b if it is a matter of evidence, it is for the Judge of fact to say whether he is satisfied from it that the risk notes were actually executed. Mr. Das of course relies strongly upon the fact that they have not been produced. In the present case the learned Judge is not satisfied that the petitioner has proved that these consignments were covered by the risk notes. On the actual evidence on the record, it would be impossible to say that the Judge of fact was unreasonable whichever view he took of it. As it has been found that no risk note was executed in this case, the petitioner would be
c entitled to claim that the balance of the freight should be deducted from the damages.

Dr. Basak, however, contended that this is not really a matter of evidence at all. The petitioner is entitled to succeed when once he has proved that the existence of a risk note is endorsed on the railway receipt and that the goods were carried at the lower rate. For this proposition he relies upon the decision of Chotzner J., in A. I. R. 1925 Cal. 915.⁴ With great respect to that learned Judge, I find it rather difficult to follow his judgment. It might proceed either upon the basis that the matters referred to are conclusive proof that the risk note was executed or upon the basis
d that the railway receipt forms the contract between the parties. It appears to me that the learned Judge intended to base his decision upon the latter finding. He certainly does not say that it is a matter of conclusive proof. Dr. Basak entirely failed to persuade me that there is any authority or principle on which I could so hold, and the most that can be said is that it is a matter of evidence.

The question, therefore, remains whether this receipt contains the terms of the contract. It has been placed before me and it contains no terms whatsoever. It is merely evidence to show that certain goods were placed in the custody of the railway and that

a certain sum was paid as freight. If the contract is contained in the railway receipt, the railway authorities would obviously not be justified in realising further money when the freight has been wrongly calculated. But even supposing that the railway receipt did contain the terms of the contract, it does not contain anything about the risk note. This is added in writing by the booking clerk. It would have to be proved that the consignor knew the meaning of the hieroglyphic 'H' and that he accepted it as part of the contract. If this was so, it would really be unnecessary to execute the risk note at all. I have no hesitation in overruling the contention of the petitioner on this point. The case is therefore governed by Ss. 151 and 152, Contract Act. In my judgment the learned Judge dealt with the case properly on that footing. The bailee is bound to take as much care of the goods as a man of ordinary prudence would take of his own goods under similar conditions. The finding of the Judge is that there was plenty of time to transfer the fish to the connected train. There can be no doubt whatever that, if the goods had belonged to the clerk himself, he would have taken very good care to tranship these perishable articles first. That, however, is not
g sufficient to dispose of the matter. It is further necessary for the plaintiff to prove that the damage to the fish was due to the delay at the Mokamah Ghat station. The learned Judge has not dealt with this aspect of the case at all. This may in part be due to the inconsistent pleading of the petitioner. At the trial the petitioner put forward a story that the fish was in splendid condition when it arrived and that no damage was caused at all. The learned Judge was so busy in disbelieving this story that he neglected to deal with the further point as to the cause of the damage.

Mr. Das relied upon some circumstantial evidence. In the first place a risk note A was not demanded from the consignor by the station master. This, if unexplained, would justify an inference that the fish was not rotten when it was actually consigned. But this would not carry the plaintiff very far in proving this point. The other thing upon which Mr. Das relies is the price fetched at the sale. That of course is one of the factors which has to be taken into account; but if I were dealing with the matter myself, I should not think that it went very far in proving the cause of the damage. On the other hand, there was some very strong evidence in favour of the petitioner. The plaintiff's claim with regard

4. (25) 12 A.I.R. 1925 Cal. 915 : 86 I.C. 558, E. I. Rly. Co., Ltd. v. Ram Chabila Prasad.

a to another consignment automatically failed, because there was no delay on the journey and there was nothing upon which any claim against the petitioner could be established. It was therefore conclusively shown with regard to this consignment that the damage to the fish had nothing whatever to do with any conduct of the railway authorities. Then in the second place, D. W. 13 proved that other fish despatched from the same station was in quite good condition when it arrived at Howrah still later.

The plain fact of the matter is that the plaintiff was really trying to make out a case b of *res ipsa loquiter*. That of course was quite hopeless. Paragraph 10 of the written statement gave him due notice that the petitioner's case was that any damage which might have been caused was not due to the failure of the consignment to catch the first available train. The evidence actually on the record is far stronger for the petitioner than for the plaintiff. If I were to remand the case on the present evidence, the learned Judge would not really be justified in coming to a finding in favour of the plaintiff. I am certainly not prepared to give the plaintiff an opportunity to produce any further evidence. At the trial c some frivolous defences were taken by the petitioner; I shall therefore not allow him any costs in that Court. The rule is made absolute, the decree of the lower Court is set aside and the suit is dismissed. The plaintiff will pay the costs of the petitioner in this Court—hearing fee, two gold mohurs. Each party to bear his own costs in the lower Court. I have already observed that in view of the finding that there were no risk notes, the petitioner will be entitled to charge the full freight on the consignments covered by P. W. B. 5622, 5626 and 5628. This will be deducted from the price fetched at the auction and the d balance will be paid to the plaintiff.

G.N.

*Rule made absolute.***A. I. R. (31) 1944 Calcutta 53**

BISWAS J.

Girish Chandra Santra and others

v.

Purna Chandra Bhattacharjya & others.

Appeal No. 1151 of 1940, Decided on 7th May 1943.

(a) Estoppel—Person moving Court under S. 47, Civil P. C., cannot subsequently say, when decision is against him, that he was not competent to move and Court was not competent to deal with the matter.

Where a person has moved the Court under S. 47, Civil P. C., and invited a decision on his application, it is not for him to turn round and say because the decision has gone against him, that neither was he competent so to have moved the Court, nor was it

competent for the Court to have dealt with the matter on being so moved. [P 54f] e

(b) Civil P. C. (1908), S. 47 — Post-decree agreement—Decree left untouched—Execution merely restrained—Executing Court alone is to determine the matter—No separate suit would lie.

A post-decree agreement may in some circumstances be excluded from the purview of the executing Court under S. 47, but whether this will or will not be so will depend upon the nature of the agreement. If a post-decree agreement seeks to affect the character of the decree, it may be said that this is a question which could be raised only by an independent suit, and not by an application under S. 47. But where it leaves the decree untouched, and merely seeks to restrain its execution, it is just one of the matters which it is peculiarly within the province of the executing Court to consider and determine: *Case f law referred.* [P 55d,e]

C. P. C.—

('40) Chitaley, S. 47 N. 41 Pt. 2.

('41) Mulla, Page 180 Para. 7.

Amrita Lal Mookerjee—for Appellants.*Bhupal Ch. Roy Chaudhuri*—for Respondents.

Judgment. — This is an appeal on behalf of the plaintiffs in a suit in which they asked for a declaration that their interest in certain properties was not affected by an execution sale (in Money Execution Case No. 1436 of 1935) on the ground that the sale had been held in breach of an agreement on the part of the decree-holders not to execute the de- g cree. The plaintiffs also prayed, in the alternative, for damages for breach of the agreement. The trial Court dismissed the claim on either head, while on appeal the lower appellate Court dismissed the suit against the auc- h tion purchaser, defendant 7, but granted a decree for damages against the decree-holders, defendants 1 to 6, in the sum of Rs. 100. In the present appeal the plaintiffs have questioned the competency of the sale as well as the sufficiency of the damages allowed.

The material facts may be shortly stated. On 21st December 1925, defendants 1 to 3 (whose interest is now represented by defen- h dants 1 to 6) obtained a money decree against the plaintiffs in Money Suit No. 916 of 1924 in the Court of the First Munsif of 24 Parganas. There was an appeal, and while the appeal was pending, a solenama was entered into and filed in another suit which was then pending between the parties, Title Suit No. 194 of 1922, before the Fourth Subordinate Judge at Alipore. By this solenama it was agreed, inter alia, that the defendants would give up their claim in the money suit and not execute the decree they had obtained, and that the plaintiffs in their turn would withdraw their appeal against the decree. In due course a decree followed on the solenama. The plaintiffs afterwards instituted a suit for setting

a aside the solenama decree (Title Suit No. 154 of 1929), and in repudiation of the solenama, they also carried on their appeal in the money suit. Both these proceedings ultimately failed. The suit for setting aside the solenama decree was dismissed by the trial Court on 22nd April 1930, and this was finally affirmed in second appeal by this Court some time in 1933. As regards the appeal in the money suit, this was also dismissed on 10th May 1927; there was thereafter an application in revision to this Court, which ordered a re-trial, but on re-trial the decree as originally made was restored on 29th June 1929, and an appeal from the decree was also dismissed in April 1930. The decree was then put into execution in Money Execution Case No. 1436 of 1935, and a sale held thereunder on 7th December 1935, at which defendant 7 became the auction purchaser. It is this sale which is the subject-matter of the present suit, and the main contention of the plaintiffs is that the solenama was a bar to the execution proceeding which resulted in the sale.

The lower appellate Court has held, and it is not now disputed, that the solenama decree on being finally upheld by this Court in second appeal became effective between the parties, so as to be operative on the decree in the money suit as made after re-trial. That being so the plaintiffs might no doubt maintain that in view of the clear stipulation in the solenama it was not competent to the defendants to execute the money decree and sell the plaintiffs' properties in such execution. In point of fact, it appears that shortly after the sale the plaintiffs applied under O. 21, R. 90, Civil P. C., for setting aside the sale on the usual allegations of fraud and material irregularity, and in the application they raised this specific objection under S. 47 to the competency of the sale. The application was dismissed on 27th July 1936. The Court found that there was no fraud or irregularity in publishing or conducting the sale, the sale processes had been all duly served, and the sale was otherwise valid. As regards the effect of the solenama, the learned Munsif observed as follows:

"I do not see how this decree should be the subject of a compromise which was arrived at 3 years earlier. This decree obviously had no existence at that time."

In saying this, the learned Munsif evidently went by the original date of the solenama (24th March 1926) and the date (29th June 1929) on which the money suit was decreed on re-trial. Whether this was a correct view to take or not, the fact remains that the plain-

tiffs' objection to the execution on the ground a of the solenama was negatived.

The same objection has now been renewed by the plaintiffs in the present suit, and to this the defendants raise a two-fold plea in bar, which has been given effect to by both the Courts below. It has been held, in the first place, that the question raised in the suit is one under S. 47, Civil P. C., and the suit is consequently not maintainable, and secondly, that it is also barred by *res judicata* by reason of the previous decision in the proceeding for setting aside the sale. Both these grounds are strenuously contested by the learned advocate for the appellant. Whether the law is on the side of his clients or not, it hardly admits of doubt that their conduct has very little of merit in it. Having themselves moved the Court under S. 47 of the Code and invited a decision on their application, it is not for them now to turn round and say, because the decision went against them, that neither were they competent so to have moved the Court, nor was it competent for the Court to have dealt with the matter on being so moved. And yet this is the position which they must take up in order to sustain their present contentions. These contentions may be now examined.

First, as to the bar under S. 47, Civil P. C. 9 This section provides that all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit. *Prima facie* it is difficult to see why such a question, as it sought to be raised by the plaintiffs in this case, affecting the decree-holders' right to maintain the execution, should not be regarded as coming within the terms of the section. The validity of the decree is not challenged; but it is merely urged, treating the decree as one which was validly passed and would be susceptible of execution in the ordinary course, that by a voluntary agreement on their part the decree-holders had disentitled themselves to realise it by execution. It seems to me that this is pre-eminently a matter for the executing Court to deal with. The ordinary rule no doubt is that the executing Court cannot go behind the decree, in other words, it must accept the decree as it stands, but even so, it has been held by the Full Bench in 53 Cal. 166,¹ that where a decree is challenged as being without jurisdiction, the executing Court may go into

1. ('25) 12 A.I.R. 1925 Cal. 907 : 89 I. C. 685 : 53 Cal. 166 : 42 C. L. J. 1 : 29 C. W. N. 948 (F. B.), *Gora Chand Halder v. Prafulla Kumar Roy*.

a the question and refuse to execute the decree, if it finds that it was really without jurisdiction. Reference may also be made to another Full Bench decision, 57 Cal. 1013,² in which it has been held that where an application is made for execution of a final decree after the preliminary decree has been reversed on appeal, it is competent to the executing Court to refuse execution on the ground that the decree having been superseded as a result of the appeal, it is no longer valid and operative. In the present case it is not necessary to stretch the rule to this extent, inasmuch as the decree itself is not impugned as a nullity b or attacked on any other ground tending to destroy its every existence, but all that is said is that by reason of certain circumstances extraneous to the decree, and not impinging in any way upon its validity or operative character, its enforcement has been suspended. As I have said, I can find no reason for holding that this is not a matter which may legitimately come within the purview of the executing Court under S. 47 of the Code.

The learned advocate for the appellant referred me to certain cases in which it has been held that where the judgment-debtor objects to the execution on the ground that c prior to the passing of the decree, the decree-holder agreed not to execute it, the question is one which could not be determined by the executing Court under S. 47. Amongst others, reliance was placed on 31 Cal. 179,³ which followed the earlier cases in 29 Cal. 810⁴ and 6 C. W. N. 796.⁵ These were all cases of pre-decree agreements, and if I have been able to follow the ratio decidendi in these cases aright, it was that the question which fell to be determined was whether or not by reason of the agreement there could at all be a decree in the form in which it had been actually made. That is an entirely different question d from what has to be considered in the present case. This is a case of a post-decree agreement, and even if it be supposed that on principle there should be no difference between a pre-decree agreement, and a post-decree agreement, it is still to be observed that the agreement here does not purport in any way to affect the character or form of the decree. I do not suggest that a post-decree agreement may not in any circum-

stances be excluded from the purview of the executing Court under S. 47, but whether this will or will not be so will depend upon the nature of the agreement. If a post-decree agreement seeks to affect the character of the decree, it may no doubt be said that this is a question which could be raised only by an independent suit, and not by an application under S. 47. As I have already pointed out, I do not think that the agreement in this case may be regarded as having any such effect on the decree. In my view, it leaves the decree untouched, and merely seeks to restrain its execution, and it is, therefore, just one of the matters which it is peculiarly within the province of the executing Court to consider and determine. The learned advocate drew my attention in this connexion to the observations of the Judicial Committee in the recent case in 66 I. A. 84.⁶ The passage on which he relied is at page 102 of the report :

"If it appears to the Court, acting under S. 47, that the true effect of the agreement was to discharge the decree forthwith in consideration of certain promises by the debtor, then no doubt the Court will not have occasion to enforce the agreement in execution proceedings, but will leave the creditor to bring a separate suit upon the contract. If, on the other hand, the agreement is intended to govern the liability of the debtor under the decree and to have effect upon the time or manner of its enforcement, it is a matter g to be dealt with under S. 47. In such a case to say that the creditor may perhaps have a separate suit is to misread the Code, which by requiring all such matters to be dealt with in execution discloses a broader view of the scope and functions of an executing Court."

I do not see how these observations assist the appellants in any way. On the contrary, their Lordships state quite clearly that where the agreement is intended to govern the liability of the debtor under the decree and to have effect upon the time or manner of its enforcement, the matter is to be dealt with under S. 47. Even in the earlier part of the passage where their Lordships say that the creditor h may be left to bring a separate suit upon the contract, they point out that if it appears to the executing Court that the true effect of the agreement is to discharge the decree forthwith, the Court will have no occasion to enforce the agreement in execution proceedings, meaning thereby that while it will be open to the executing Court to take notice of the agreement for the purpose of refusing execution, the decree-holder will be relegated to a separate suit if and in so far as he wishes to enforce any promises made by the debtor

2. ('29) 16 A.I.R. 1929 Cal. 689 : 123 I. C. 305 : 57 Cal. 1013; 50 C. L. J. 566: 34 C. W. N. 56 (F. B.), Talebali v. Abdul Aziz.

3. ('04) 31 Cal. 179, Hasan Ali v. Gauzi Ali Mir.

4. ('02) 29 Cal. 810 : 6 C. W. N. 838, Benode Lal Pakrashi v. Brajendra Kumar Saha.

5. ('02) 6 C. W. N. 796, Chhoti Narain Singh v. Mt. Rameshwar Koer.

6. ('39) 26 A. I. R. 1939 P. C. 80 : 180 I. C. 378: 14 Luck. 192 : 66 I. A. 84 : I. L. R. (1939) Kar. P. C. 136 (P. C.), Oudh Commercial Bank, Ltd. v. Bind Basni Kuer.

^a in or as consideration for the agreement. Where the agreement amounts to an adjustment of the decree, it is a different question whether or not the executing Court may take notice of it unless the adjustment is recorded under O. 21, R. 2 but their Lordships do not appear to be in any doubt that subject to that, the matter will fall to be determined by the executing Court. In the case before the Judicial Committee the agreement was a bargain for time in consideration of a higher rate of interest, and it was held to be an agreement having effect upon the parties' rights under the decree, which it was within ^b the jurisdiction of the executing Court under S. 47 to recognise and act upon. It may be that the agreement here is not one giving time to the judgment-debtors, but exonerating them altogether from liability under the decree, but this is a circumstance which in my opinion makes no difference, in that the agreement still remains an agreement upon terms which, in the words of their Lordships in another part of the judgment, have reference to and affect the execution, discharge or satisfaction of the decree. There is no reason, therefore, why it cannot be dealt with under S. 47. There is no question in the present case ^c of any attempt by the decree-holders to enforce in execution any liability under the agreement extraneous to the decree or to the suit in which the decree was passed, for which a separate suit might have been necessary. In my opinion, therefore, the first point raised by the appellants must be overruled, and I must hold that S. 47 of the Code is a bar to the present suit.

The appellants' second contention in answer to the plea of *res judicata* must equally fail. The whole basis of the argument on this part of the case is that the executing Court had no jurisdiction to go into the question as to the effect of the solenama on the decree-holders' ^d right to execute the decree, and that any adjudication by that Court on that question could not consequently operate as *res judicata*. As, however, I have shown above, this was a matter which it was not only within the competence, but also within the exclusive jurisdiction, of the executing Court to deal with under S. 47. In particular, it may be added that having regard to the form in which the question had been raised in the executing Court, the learned advocate, on his attention being drawn to it, had himself to concede jurisdiction. The issue in that Court was in this form: "Is the story of adjustment of the decree by solenama true, if so, is the execution case at all maintainable?" The answer

which the Court gave to the question was in the negative. Whether that was a correct answer or not is immaterial: it remains a fact that the question had been raised and decided against the appellants, and I see no reason why they should be allowed to re-agitate the same question in the present suit.

The result is that in so far as the plaintiffs seek to challenge the competency of the sale on the ground that it was held in breach of the terms of the solenama, the suit must be held to be not maintainable. Their claim to damages for breach of the solenama obviously stands on a different footing, and this was not disputed by the respondents. It is necessary, ^f therefore, to consider the appellants' objection regarding the quantum of damages awarded. The learned Subordinate Judge allowed a sum of Rs. 100 only, that being the price of the property fetched at the execution sale. It may be conceded that this is not necessarily a correct measure of the damages which may be claimed by a judgment-debtor for wrongful sale of his properties by the decree-holder despite a binding agreement to the contrary. But in assessing damages the Court is undoubtedly entitled to take into consideration the conduct of the parties. It is quite true ^g that the decree-holders here in putting the decree into execution acted in violation of their undertaking not to execute it, but the plaintiffs on their part were the first to repudiate the agreement. Contrary to the terms of the solenama they prosecuted their appeal in the money suit, and then instituted a suit for setting aside the solenama decree. It was certainly not due to them that both the appeal and the suit ultimately failed, and though as a result, as was held by this Court in second appeal, the parties were restored to their original position under the solenama, and the appellants could consequently claim ^h the benefit of it in an appropriate proceeding, it does not follow that in a suit for damages for breach of the agreement, their own conduct should be left out of consideration altogether, not for the purpose of disallowing damages, but for assessing the amount thereof. In the circumstances of the case, I see no reason for modifying the sum allowed by the Court below in this behalf.

For the reasons aforesaid, I must affirm the judgment and decree of the learned Subordinate Judge and dismiss the appeal with costs.

R.K.

Appeal dismissed.

A. I. R. (31) 1944 Calcutta 57

MUKHERJEA AND PAL JJ.

*Asaddar Ali Khan Waqf Estate by
Mutwali Gajanfor Ali Khan and
another — Plaintiffs — Appellants*

v.

Province of Assam and others —

Respondents.

Appeal No. 352 of 1940, Decided on 19th May 1943, from appellate decree of Dist. Judge, Sylhet, D/- 23rd September 1939.

(a) Assam Land and Revenue Regulation (1 of 1886), Ss. 6 and 71 — Permanently settled estate — Adverse possessor is mere incumbrancer.

Title by adverse possession is not one of the rights that can be acquired over lands in a permanently settled estate. An adverse possessor will be only an incumbrancer. [P 59h]

(b) Civil P. C. (1859), S. 73 — Intervenor claiming adversely to plaintiff and defendant—He is not entitled to be added as party.

Where an intervenor claimed adversely to both the plaintiff and the defendant, he would not be entitled to be added as a party as his interests would not be affected by the result : 7 W. R. 201, *Rel. on.*

[P 60c]

(c) Evidence Act (1872), Ss. 13 and 43 — Judgment not inter partes — Relevancy of—Findings of fact in or reasons for judgment — Admissibility of.

A judgment not inter partes may be admissible in evidence only under S. 13 as establishing a particular transaction, if any, by which or an instance in which the relevant right was asserted, recognised, etc. The fact that there was a litigation or that as a result of that litigation the then plaintiffs recovered possession of the lands may be relevant under S. 11. The judgment not inter partes will be evidence only to the extent of showing the existence of those facts. But findings of fact in or reasons for the judgment are irrelevant and not admissible under S. 13 : ('31) 18 A. I. R. 1931 P. C. 89 and ('16) 3 A.I.R. 1916 Cal. 176, *Rel. on.* [P 60e; P 61b]

(d) Evidence Act (1872), S. 13 (a) — Word "transaction" in S. 13 (a)—Scope and meaning of—Suit is not transaction.

Section 13 (a) speaks of transactions by which the right is asserted and not those in which the right is claimed. The nature and scope of the transaction is thus a pertinent consideration : ('41) 28 A.I.R. 1941 Cal. 541, *Rel. on.* [P 61c]

The proposition to be proved is the right claimed or denied in the suit. A transaction by which this right might have been asserted or denied, etc., is only a material evidencing the proposition. The ultimate *factum probandum* is the right claimed or denied in the suit. The transaction is only an evidentiary fact, the *factum probans*. This *factum probans* itself in its turn may require proof and may thus become an intermediate proposition to be proved. A judgment may come in under S. 13 only as an evidentiary fact to establish this intermediate proposition. When established the proposition only brings in a *factum probans* and nothing else.

[P 61 c,d]

A suit is not a transaction within the meaning of S. 13 : ('31) 18 A. I. R. 1931 P. C. 89, *Rel. on.*; 10 Bom. 439, *Approved.* [P 60f,g; P 61e]

1944 C/8 & 9

(e) Record of Rights—Survey papers — Evidentiary value—Whether land was included in permanent settlement is question of fact — Onus.

The question whether any particular land was included in the permanent settlement is a question of fact and not of law and the onus of establishing this fact is on those who affirm that such was the case. Subsequent survey papers will only be relevant evidence for the purpose. The question may or may not be satisfactorily proved by such subsequent survey papers. It will be wrong even to say that the burden of proof is shifted on to the other side by such survey papers. It cannot again be said as a matter of law that such survey papers should be held sufficient proof of the fact. It would not be right to act on the thak treating it as decisive in the absence of evidence to the contrary. At the same time the thak is a valuable piece of evidence and where there is no question of any change since the permanent settlement caused by the erosive action of any large and violent river, its probative value is really very great. [P 62f,g]

Dr. Nares Chandra Sen Gupta and Hemendra Kumar Das — for Appellants.

Dr. Sarat Chandra Basak, Rama Prosad Mookerji, Paresh Lal Shome and Satyendra Kisor Ghose — for Respondents.

Upendra Kumar Roy — for Minor Respondents (represented by Deputy Registrar).

Pal J.—This appeal is by the plaintiffs in a suit for the recovery of possession of the disputed lands on a declaration that the same appertain to taluk No. 1079/7 Bakar Mahmud. The taluk No. 1079/7 was sold for arrears of revenue on 22nd September 1921 and was purchased by the plaintiffs at that sale. This sale was confirmed on 17th July 1922 and the plaintiffs took delivery of possession of the taluk on 10th June 1923. The present suit was instituted on 17th July 1934. The plaint related to the lands of several moujas. The appeal before us however relates only to the lands of mouja Baneshwarpur. As regards these lands the case of the plaintiffs as made in the plaint is: (1) That from the time of the permanent settlement lands measuring 111 acres 1 rood 26 pole and recorded as residue chak (*abashishta*) in thak map No. 3992 relating to mouja Baneshwarpur appertained to the taluk No. 1079/7 Bakar Mahmud : (Para 4 of the plaint). (2) That the principal defendants taking advantage of their position as previous proprietors of the mahal kept the plaintiffs out of possession of this land. Three sets of defendants contest this claim. Defendant 104, the Secretary of State for India in Council (now, the Province of Assam) claims this as illum lands. Defendants 122 to 140, 142 and 143 claim portions of the land as appertaining to their separate accounts carved out of the taluk No. 1079. Defendants 44-46, 51, 52, 55-64, 68-81, 84-87, 90, 101 and 103 are the settlement holders

a from the Government as illum lands. The case of defendant 104 (now the Province of Assam) is to be found in paras. 9, 12 to 15 of its written statement. In para. 9 the defendant asserts that the thak survey is full of inaccuracies. Paragraphs 12 and 13 run as follows :

12. "The lands claimed as appertaining to the residuary Chak of Mouza Baneshwarpur, were really Illum, i.e., unsettled lands, and were surveyed as such by Lt. Fisher in the year 1244 B.S., which was long before the date of the Thak survey. These lands have since been treated all along as Illum lands, and have been included in all the later Illum surveys made from time to time. It appears that as far back as in the year 1848, these lands were settled with one Dhan Ram Ghosh and others for a period of 10 years. A dispute having arisen in that connexion, the said Dhan Ram Ghosh and others ultimately instituted a suit in the Court of the Sadar Munsif at Sylhet, being Suit No. 172 of 1862, claiming those lands as Illum unsettled lands. The said suit was decreed in favour of the plaintiffs and the decree was upheld on appeal by the District Judge as well as by the High Court."

13. "It appears that in late years the said lands of Mouza Baneshwarpur along with other lands were settled first with Raja Ram Ghosh and others under Potta No. 58368/17 for a period of 15 years from 1285 to 1299 B.S. and subsequently to that to various other people under similar periodic pottas, and were possessed as such by the settlement holders. The lands are still in the possession of the settlement holders under the Government and the owners of Taluk No. 1079/7. Bakar Mahmud never claimed or possessed them."

Paragraph 14 is a mere repetition of the statements contained in paras. 12 and 13 and in para. 15 it is stated :

"The plaintiffs as purchaser at a sale for arrears of revenue are only entitled to the Taluk as it existed at the date of the permanent settlement. The fact that the disputed lands were shown in the Thak survey within the ambit of the plaintiffs' taluk is not necessarily evidence that it was so included at the time of the permanent settlement. But in the present case, the history of these lands prior and subsequent to the Thak survey completely demolishes any presumption arising out of the papers relating to the said survey."

d Paragraphs 13 to 20 of the written statement by the second set of the defendants named above (namely defendants 122 to 140, 142 and 143) contain their case. According to them separate account No. 3 Mahammad Nazim was carved out of taluk No. 7 Bakar Mahmud in 1883 in respect of land of mouza Lakshmipur and separate account No. 8 Gouri Singh was carved out in respect of lands of mouzas Baneshwarpur and Lakshmipur in 1885 and portions of the residuary chak of mouza Baneshwarpur were allotted to these separate accounts. The settlement holder defendants (such as the defendants 44, 44Ka, 45, 46, 51, 52, 54 to 64, 68 to 81, 84 to 101 and 103) in their written statements assert that the thak of mouza Baneshwarpur is erroneous and that

the disputed lands do not appertain to the plaintiffs' mahal. On these pleadings 14 issues were raised. Of these issue 6 is the only issue material for the purposes of the present appeal. This issue is : "Have the plaintiffs their alleged title to the lands of mouza Baneshwarpur and Baharpur?" The issues were framed on 1st May 1935. On 24th May 1935, the plaintiffs filed a petition praying for a local investigation. On 8th June 1935, the plaintiffs and defendant 104 filed the documents to be relayed by the Commissioner. On 8th July 1935, the Court made the order appointing a Commissioner for local investigation in the following terms :

"It is necessary in this case to issue a commission to ascertain the lands in suit and also the lands covered by the different separate accounts carved out of the original mahal. It is therefore ordered that a Commissioner be appointed to hold a local investigation in the matter. The Commissioner is directed to survey the lands of the disputed mahal, to prepare a map and to ascertain the lands of the separate accounts appertaining to the mahal as claimed by the defendants. . . ."

The Commissioner prepared two maps for mouja Baneshwarpur. The Commissioner says :

"In mouja Baneshwarpur as I had to compare a large number of survey papers and documents on behalf of defendant 104 I have drawn the comparative map of the disputed residuary chak on an enlarged scale of 32" = 1 mile."

In mouja Baneshwarpur the Commissioner found five different residuary chaks all of which were claimed by the plaintiffs. He numbered these chaks and found that Nos. 1 and 3 wholly and Nos. 2 and 4 substantially fell within the separate accounts, but that practically the whole Block No. 5 fell outside the separate accounts. Defendant 104, the Secretary of State, claimed only this Block No. 5 as illum land. In support of their claim the plaintiffs relied on the thak papers, the records of the proceedings for opening the separate account out of the original mahal taluk Bakar Mahmud and on the Halabadi Chitta of Mr. Tucker. According to them this Halabadi survey was older than the alleged survey of Lt. Fisher of 1244 B. S. Defendant 104 relied on the following papers : (1) Chitta dated 1244 B.S. (2) Decree in Title Suit No. 172 of 1861. (3) Map, Field Book and Chitta of 1870-71. (4) Kabuliyat dated 1878. (5) Moulvi A. Rashid's map and chitta of 1924-25. As regards the land covered by the decree in Title Suit No. 172 of 1861, the Commissioner observes :

"It appears that the suit was instituted by one Dhanaram Ghosh along with other persons for the lands described in 6 different dags of the plaint. All these dags are described in terms of different plots of a Chitta, which was not either compared or produced

a before me; it appears that the illum block was surveyed again after the survey of 1244 B.S. And in absence of that Chitta, I am of opinion that the dags of the decree could not, quite accurately, be shown to me."

Coming to the Chitta of 1244 B.S., the Commissioner compared it with the Chitta of 1871 and found that several plots shown as illum in the Chitta of 1244 B.S. were excluded in the Illum Survey of 1871. Some of these are admittedly permanently settled lands. The learned Subordinate Judge decreed the plaintiffs' claim in part accepting the report of the Commissioner. In the course of his judgment the learned Judge observed :

b 1. "From the thak statement (Ex. 7a) read with the thak map (Ex. 6A) it would be evident that the Taluk No. 1079/7 Bakar Mahmud which has been auction purchased by the plaintiffs at the revenue sale consists of the lands of residuary chaks in mouza Baneshwarpur. There was practically no dispute on the point at the trial."

2. "(a) The pleader Commissioner has relaid the thak map in the locality and shown that the Taluk No. 7 Bakar Mahmud consists of the lands of the five blocks of residuary chaks of the thak in mouza Baneshwarpur." (b) "The finding of the Commissioner on the point and the correctness of his relay of the thak map of Baneshwarpur mouza in the locality have not been challenged before me and must accordingly stand." (c) "As a result of his investigation he has found that the whole of c the Block V of the residuary chak of the mouza is within the residuary mahal in suit. This finding of the Commissioner is not challenged before me."

3. "The contention of defendant 104 that the entire lands of Block V of Residuary Chak of Mouja Baneshwarpur are Illum lands cannot be given effect to. (a) The thak papers clearly raise a presumption that the entire lands of Block V of the Residuary Chak of that Mouja are situated within the ambit of the Mahal in suit ; (b) The contesting defendant 104 has filed the Chitta (Ex. A/104) dated 1244 B. S., petition (Ex. B/104) dated Magh 1255 B. S., the order of the Commissioner (Ex. C/104) dated 6th December 1851 and the Kabuliat (Ex. D/104) dated 20th November 1848 and the petition (Ex. K/104) dated March 1851 for rebutting that presumption; (c) I don't think these documents are at d all sufficient to rebut the presumption of correctness of the thak papers in the present case ; (d) The Government has withheld (i) the Chitta prepared at the Survey of Lt. Fisher during the years 1829 to 1834, (ii) the Chitta referred to in the settlement proceedings of 1244 B. S. and in the suit of 1861."

On appeal by defendant 104 and defendants 44, etc., the learned District Judge dismissed the claim of the plaintiffs to this land holding: (1) That the plaintiffs failed to establish their title to the Baneshwarpur lands as appertaining to the residuary mahal Bakar Mahmud. (2) That at any rate the title, if any, of the proprietors of the mehal to this land became extinguished by the adverse possession of the Crown and that adverse possession by the Crown is not an incumbrance within the Regulation. In arriving

at the conclusion that the plaintiffs failed e to establish that the disputed lands of mouza Baneshwarpur appertained to the mehal Bakar Mahmud purchased by the plaintiffs, the learned District Judge principally relied on his finding that the thak papers were incorrect. Dr. Sen Gupta, appearing for the plaintiffs-appellants before us, contends : (1) That the Court of appeal below went wrong in holding that adverse possession by the Crown would not be an encumbrance within the meaning of the Regulation. (2) That the finding arrived at by the Court of appeal below that the thak papers are incorrect is vitiated, (a) being based on inadmissible evidence, (b) not being passed on the whole evidence on the point. Dr. Sen Gupta contends f that the reasons and findings of fact in the judgments in the 1861 suit are not admissible in evidence in the present case. In deciding the question whether the thak represents the correct state of things the learned District Judge has principally relied on the findings of fact and the reasons given in these judgments. Further the learned Judge has relied on Ex. A which has been shown to be a chitta not prepared by any public officer for any public purposes at all. The learned Judge did not at all take into consideration the fact g that defendant 104 withheld some material documents in its possession.

Mr. Mukherjee, appearing for defendant 104, contends: That the finding that the land in suit does not appertain to the plaintiffs' estate is based on evidence admissible in law and is a finding of fact not assailable in second appeal. Mr. Mukherjee concedes that if the plaintiffs succeeded in showing that the lands appertained to their estate then any title acquired in them by adverse possession would be an incumbrance within the meaning of S. 71 of the Assam Regulation, 1 of 1886. He did not support this part of the judgment of the learned District Judge. The other defendants h adopted the argument of Mr. Mukherjee in support of the decree in their favour.

In our opinion, Mr. Mukherjee rightly concedes that if the plaintiffs succeed in showing that the lands were included in their permanently settled estate, then the title acquired by any adverse possession will be no answer to their claim. The Assam Land and Revenue Regulation, 1886 (Regulation 1 of 1886) applies to this case. Section 6 of the Regulation lays down what rights may and what may not be acquired over such lands. Title by adverse possession is not one of the rights that can be acquired. An adverse possessor will, in our opinion, be only an incumbrancer. Section 71

a of the Regulation lays down that the estate will be sold free of all such incumbrances. The Government does not claim to have been in possession directly and adversely to the proprietors. The only possession claimed in the case is of some private persons in assertion of the illum character of the land or, more appropriately in denial of its settled character. The Government only claims to have been in possession through them. It is not even the case of the Government that the persons were inducted on the land by it. The title acquired by these persons by adverse possession was undoubtedly a mere incumbrance. The Government claiming possession through them could not have acquired any better title. Besides we do not see why even direct adverse possession by the Government shall not come within the description of "incumbrances previously created thereon by any other person than the purchaser" as given in S. 71 of the Assam Regulation 1 of 1886. As regards the settlement holder defendants, they did not make any case of their interest being "tenures created bona fide" within the meaning of the excepting clause (b) of S. 71 of the Regulation. They, therefore, stand or fall with defendant 104.

c As regards the second point urged by Dr. Sen Gupta, we must at the outset, point out that the judgments in question were not inter partes. Even the then proprietors of the estate were not parties to the suit in which these judgments were pronounced. The suit No. 172 of 1861 was governed by the Code of Civil Procedure of 1859 (Act 8 of 1859). Section 73 of the Act provided for intervenors. Where an intervenor claimed adversely to both the plaintiff and the defendant, he was not entitled to be added as a party as his interests would not be affected by the result : 7 W. R. 201.¹ Obviously, the then proprietors of the taluk Bakar Mahmud attempted to intervene in the suit under this

d S. 73 of the Code. The recital in the appellate judgment in that case shows that they claimed adversely to both the plaintiff and the defendant in that suit. As far as can be gathered from the documents on the record, they were not added as parties to the suit either as the plaintiffs or as the defendants. The decree of the first Court (Ex. X) does not at all contain the names of these proprietors. The decree of the first appellate Court (Ex. Y) names them as objectors as distinguished from the appellants and the respondents. The decree of the High Court (Ex. Y) also does not at all contain their names. Admittedly, the Crown was not a party to this suit at all. In these

circumstances the judgments (Exs. Z, Z-1 and Z-2) in that suit are certainly not judgments inter partes so far as the present plaintiffs, defendant 104 and the defendants claiming through defendant 104 are concerned. Those judgments not inter partes might be admissible in evidence only under S. 13, Evidence Act, as establishing a particular transaction, if any, by which the relevant right was asserted, recognised, etc. Findings of fact in or reasons for the judgment are irrelevant and not admissible in the present case: 58 I. A. 125.² As was pointed out by Mookerjee J. in 23 C. L. J. 583³ at p. 585,

"although a judgment not inter partes may be used in evidence in certain circumstances, as a fact in issue, or as a relevant fact, or possibly as a transaction, . . . , the recitals in the judgment cannot be used as evidence in a litigation between other parties. The principle is that all judgments are conclusive of their existence, as distinguished from their truth; judgments as public transactions of a solemn nature, are presumed to be faithfully recorded. Every judgment is, therefore, conclusive evidence, for or against all persons, whether parties, privies or strangers, of its own existence, date and legal effect, as distinguished from the accuracy of the decision rendered; in other words, the law attributes unerring verity to the substantive as opposed to the judicial portion of the record."

The judgment itself may not be a transaction and the question whether a suit is a transaction within the meaning of the Evidence Act, is not altogether free from difficulties. Only by a somewhat strained use the term may be held applicable to proceedings in a suit, and if this extended use be taken to have been the intention of the Legislature in framing the Indian Evidence Act the result would be to effect a departure from the English rule of Evidence, as was pointed out by Sargent C. J. in 10 Bom. 439⁴ at p. 442. In 58 I. A. 125² neither the judgment itself nor the suit was taken to be a transaction. It was "the partition resulting from the 1793 suit" which was taken to be the relevant transaction, relevant under S. 13, Evidence Act. The judgment was held to be admissible only to prove this transaction. The right claimed was the partibility of the estate. A partition was certainly a transaction by which partibility could be said to have been claimed, asserted or recognised.

In this particular case the recitals in the judgment of the first appellate Court (Ex. Z-1) show that the then proprietors of the mahal Bakar Mahmud claimed the lands in dispute

2. ('31) 18 A. I. R. 1931 P. C. 89 : 131 I. C. 753 : 58 I. A. 125:58 Cal. 1187 (P.C.), Gobinda Narayan Singh v. Shamlal Singh.

3. ('16) 3 A. I. R. 1916 Cal. 176 : 35 I. C. 298 : 20 C. W. N. 643 : 23 C. L. J. 583, Bashinath Pal v. Jagat Kishore.

4. ('86) 10 Bom. 439, Ranchoddas Krishnadas v. Bapu Nashar.

a in that suit as appertaining to their estate. The question whether or not the lands appertained to any settled estate or to unsettled illum lands was expressly left undecided by the High Court, as according to this Court, the then plaintiffs were entitled to succeed in that suit only on the strength of their long possession. Further, as the plaintiffs in that suit did not and could not claim under any settlement from the Government, the question whether the lands were illum lands or not was irrelevant for the purpose of that suit and would not have advanced the case of the plaintiffs or detracted from it. The fact that b there was this litigation or that as a result of this litigation the then plaintiffs recovered possession of the lands may be relevant under S. 11, Evidence Act. The judgments in that case will be evidence only to the extent of showing the existence of these facts. Assuming that a suit is a transaction within the meaning of S. 13(a), Evidence Act, the existence of the suit itself will be a relevant fact and for this purpose the judgment will be evidence to show the factum of the suit as also to show its nature and scope so as to enable the Court to see whether or not it can be said that by it the right in question was claimed, recognised, asserted or denied. It should be c remembered that S. 13(a), Evidence Act speaks of transactions by which the right is asserted and not those in which the right is claimed. The nature and scope of the transaction is thus a pertinent consideration : see 45 C. W. N. 590⁵ at pages 599-600. The proposition to be proved is the right claimed or denied in the suit. A transaction by which this right might have been asserted or denied, etc., is only a material evidencing the proposition. The ultimate *factum probandum* is the right claimed or denied in the suit. The transaction is only an evidentiary fact, the *factum* d *probans*. This *factum probans* itself in its turn may require proof and may thus become an intermediate proposition to be proved. A judgment may come in under S. 13, Evidence Act only as an evidentiary fact to establish this intermediate proposition. When established, the proposition only brings in a *factum probans* and nothing else. In this particular case, the then plaintiffs really did not claim any right on the basis that the lands were illum lands. They did not claim by or under any settlement of the lands as illum lands. The only right which they could claim or assert there was one acquired by

long possession. The suit might be an instance e in which certain rights might have been claimed or recognised, etc., within the meaning of S. 13(b), Evidence Act. Even then the judgments will be admissible in evidence only for the limited purposes of the clause, namely, to prove "the instance." In no case the reasons and the findings of fact arrived at in them would be admissible in evidence in the present case.

The learned District Judge, however, made frequent references to these reasons and the findings and mainly relied on them in order to decide against the thak papers. In one place he set out the reasons given in the judgment of the first Court in that case f seriatim and pointed out that the appeal to the District Judge against this decision failed. He then proceeded to examine how far these findings were affected by the decision of the High Court and observed that whatever the High Court might have remarked about these findings and reasons was merely obiter and could not be availed of by the present plaintiffs. In another place he referred to certain findings as findings of both Courts that there was no land of mouza Baneshwarpur in taluks 19, 69 and 88 and also relied on the reasons given for rejecting the Halabadi maps g and accepting the mouzawari papers. In fact, the major portion of the judgment of the learned District Judge is devoted to the consideration of the findings of fact and reasons given in the judgments in the suit of 1861. Reading the judgment of the learned District Judge as a whole, we are of opinion that the learned Judge was very much influenced by the findings and reasons given in the judgments in the suit of 1861 and altogether ignored the fact that the materials before the Court on that occasion were not placed before the Court on the present occasion. In these h circumstances the contention of Dr. Sen Gupta must be accepted. Apart from the question that the reasons and findings of fact in that suit are not admissible in evidence against the present plaintiffs, the High Court in that case expressly left the question as to whether or not the lands in suit then appertained to any settled mahal undecided and considered this question irrelevant for decision there in view of the nature of the then plaintiffs' case. Further, it should be remembered the lands of that suit could not definitely be identified with the present suit lands. The Commissioner in his report observed :

5. (41) 28 A.I.R. 1941 Cal. 541:197 I.C. 376:I.L.R. (1941) 2 Cal. 44 : 74 C. L. J. 145 : 45 C.W.N. 590, Jogendra Krishna v. Subashini Dasi.

"It appears that the suit was instituted by one Dhanaram Ghosh along with other persons for lands described in different dags of the plaint. All these

a dags are described in terms of different plots of a chitta, which was not either compared or produced before me; it appears that the Illum block was surveyed again after the survey of 1244 B. S. And in the absence of that chitta I am of opinion that the dags of the decree could not, quite accurately, be shown to me."

The learned District Judge was also wrong in relying on the chitta Ex. A. The chitta on the basis of which the settlement of 1244 B. S. was made was that by one Gouri Charan Deb. Exhibit A is the chitta made by one Brojonath Gupta. Defendant 104 relied on this chitta as made by Lt. Fisher. Both the Courts found against this case of the defendant. There is
b nothing on the record to show who this Brojonath is and how he was connected with any public office. It has not been shewn that this chitta was prepared for any public purposes. In these circumstances it is difficult to see how this chitta is at all admissible in evidence. The learned Judge says that it is an important piece of evidence of the fact that the Government in those days was asserting illum title to these lands. But we do not at all know in connexion with which transaction or in which instance this document was made. It can be evidence of certain transactions and instances only under S. 13, Evidence Act. We
c cannot, therefore, allow the finding of the learned Judge in this respect to stand.

As, however, the case is an old one and as the question shall have to be determined on the evidence already on the record we asked the parties to place the entire evidence on the point before us so as to enable us to determine this issue of fact here in the present appeal. The evidence on the record has been placed before us, and on a careful consideration of the same we are of opinion that the plaintiffs have succeeded in establishing that the lands of block V of the residuary chak of mouja Baneshwarpur appertain to
d their permanently settled mahal 1079/7 taluk Bakar Mahmud. It is not disputed that the lands measured in blocks I to V by the Commissioner in the present case are the lands of the residuary chak of mouza Baneshwarpur as recorded in the thak papers. The Commissioner found, and that finding was accepted by the Courts below, that the lands of blocks I to IV are the lands of this residuary chak now appertaining to the separate accounts carved out of the original taluk Bakar Mahmud. The separate accounts were opened during the years 1883 to 1889: *vide* Ex. 9, 9(a), 9(b), 9(c), 9(d). The documents Ex. 9 series are the records of the proceedings for the opening of the several separate accounts under S. 11 of Act 11 of 1859. They contain the detailed

descriptions of the lands claimed as appertaining to the mahal and these descriptions read with the report of the Commissioner in the present case clearly establish that in these instances the cosharer proprietors of the original taluk Bakar Mahmud were asserting to the knowledge of the revenue authorities that the residuary chak of mouza Baneshwarpur appertained to taluk Bakar Mahmud. The several separate accounts were opened on the strength of these assertions and on each occasion the right claimed or asserted was thus recognized by the revenue authorities.

In every case the question whether any particular land was included in the permanent settlement is a question of fact and not of law and the onus of establishing this fact is on those who affirm that such was the case. Subsequent survey papers will only be relevant evidence for the purpose. The question may or may not be satisfactorily proved by such subsequent survey papers. It will be wrong even to say that the burden of proof is shifted on to the other side by such survey papers. It cannot again be said as a matter of law that such survey papers should be held sufficient proof of the fact. It would not be right to act on the thak treating it as decisive in the absence of evidence to the contrary. At the same time the thak is a valuable
g piece of evidence and where, as in the present case, there is no question of any change since the permanent settlement caused by the erosive action of any large and violent river, its probative value is really very great. (After considering the documents relied on by the defendants his Lordship proceeded.) In our opinion, the documents relied on by the defendants do not in the least detract from the correctness of the thak survey and we are satisfied that the lands of block V of the residuary chak of the thak appertain to the estate purchased by the plaintiffs at the
h sale held under Assam Regulation, 1 of 1886. In the result, therefore, this appeal is allowed. The judgment and decree of the Court of appeal below relating to the lands of block V of the residuary chak of the thak as relayed by the Commissioner in the present case are set aside and the decree of the Court of first instance in respect of these lands is restored. The parties will bear their own costs in this appeal. As regards the costs in the Courts below, the plaintiff will get the costs from the defendants, but respondents 32 to 34 will not be liable for costs in any Court.

Mukherjea J.—I agree.

G.N.

Appeal allowed.

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MUKHERJEA AND BLANK JJ.

*Ajit Kumar Haldar — Insolvent—
Appellant*

v.

*Official Receiver, 24 Parganas and
others — Respondents.*

Appeal No. 178 of 1941, Decided on 1st February 1943, from original order of Dist. Judge, 24 Parganas, D/-17th February 1941.

(a) Provincial Insolvency Act (1920), S. 42 (1) (f)—Speculation in shares by insolvent held of rash and hazardous character — Refusal to grant absolute discharge held justified.

b The insolvent who was a graduate of the University started the business of purchasing and selling shares sometimes in 1936 with an original capital of about Rs. 4000 and made considerable profits during the year 1936 and the earlier part of 1937. Sometime in April 1937, there was a great fluctuation in the share market and he went on incurring continual losses till his liability stood at the staggering figure of Rs. 1,71,000. The insolvent had absolutely no experience in the share business and the profits which he earned just after entering the business might have made him unduly optimistic :

c Held that every man must be deemed to be responsible for the way in which he conducted his business and although the type of speculation into which the insolvent had entered could not be said to be dangerous to society the insolvency Court was not wrong in saying that the speculation was of a rash and hazardous character and therefore under S. 42 (1) (f) the Court had every right to refuse to pass an order of absolute discharge. [P 63g,h]

(b) Provincial Insolvency Act (1920), Ss. 41 and 42—Order postponing insolvent's discharge till he paid eight annas in rupee cannot be made under Ss. 41 and 42.

An order postponing the discharge of the insolvent till he paid eight annas in the rupee is not warranted by the provisions of the Act. Such order does not come either under cls. (b) and (c) of S. 41 (2) or both of them taken together. The discharge is not suspended for a specified period but for an indefinite length of time, till eight annas in the rupee is paid. Such an order cannot be made under Ss. 41 and 42 of the Act. [P 63d,e,h; P64a]

d Dr. S. C. Basak and Subodh Ch. Basak —
for Appellant.

Atul Ch. Gupta, Bijan Behari Mitter, Rai Sanat Kr. Chatterjee Bahadur, Amiya Ranjan Roy Choudhury and Madhusudan Dutta —
for Respondents.

Mukherjea J. — The appellant before us is one Ajit Kumar Haldar who was adjudged an insolvent on his own application on 9th October 1939. In accordance with the direction contained in the order of adjudication, he applied for his discharge on 5th November 1940. The learned District Judge, after hearing the parties and considering the report of the receiver, refused to make an order of absolute discharge and the order he has made is to the effect that the insolvent will not get his discharge until he has paid eight annas

in the rupee. It is against this order that the present appeal has been preferred. Dr. Basak who appears in support of the appeal has assailed the propriety of this order on a two-fold ground. His first contention is that the District Judge was wrong in holding that the appellant brought on his insolvency by rash and hazardous speculations and his second argument is that the order made by the District Judge is an improper order which is not contemplated by the provisions of the Provincial Insolvency Act.

So far as the first point is concerned, it appears from the evidence that the appellant who is a graduate of the University started the business of purchasing and selling shares sometimes in 1936. It is admitted that his original capital was about Rs. 4000 and with this little money he seemed to have made considerable profits during the year 1936 and the earlier part of 1937. It is said that sometime in April 1937, there was great fluctuation in the share market and he went on incurring continual losses till his liability stood at the staggering figure of Rs. 1,71,000. Dr. Basak tried to show that the loss was due to circumstances over which the insolvent had no control. In the matter of purchasing and selling shares, he acted on the advice of recognised share-brokers and the loss was due partly to unforeseen circumstances which no amount of foresight could have averted and the negligence of the share-brokers themselves who made purchases beyond the limits of deposits kept with them by the appellant. It appears to us that the appellant had absolutely no experience in the share business and the profits which he earned just after entering the business might have made him unduly optimistic. Every man must be deemed to be responsible for the way in which he conducts his business and although we cannot go to the length of saying as the District Judge has done that the type of speculation into which the appellant entered is dangerous to society, we cannot absolve him from all responsibility in the matter and the District Judge, in our opinion, was not wrong in saying that the speculation was of a rash and hazardous character. We hold therefore that under S. 42 (1) (f), Provincial Insolvency Act, the Judge had every right to refuse to pass an order of absolute discharge.

The second point put forward by Dr. Basak, in our opinion, is perfectly sound and the appellant is entitled to succeed on that point. The order of the District Judge postponing the discharge of the insolvent till he paid eight annas in the rupee is an order which in

a our opinion is not warranted by the provisions of the Provincial Insolvency Act. Under S. 41, sub-s. (2), Provincial Insolvency Act, the Court may either (a) grant or refuse an absolute order of discharge or (b) suspend the operation of the order for a specified time or (c) grant an order of discharge subject to any condition with respect to any earnings or income which may afterwards become due to the insolvent or with respect to his after-acquired property. As laid down in sub-s. (3) of S. 42, the Court has the right of exercising the powers of suspension and attaching conditions to an insolvent's discharge under heads

b (b) and (c) concurrently, that is to say, it may suspend the operation of the order for a specified period and at the same time attach conditions to the order in the shape of payments out of the future earnings or after-acquired properties of the insolvent. The order made by the District Judge in the present case does not come either under cls. (b) and (c) of S. 41, sub-s. (2) or both of them taken together. The discharge is not suspended for a specified period but for an indefinite length of time, till eight annas in the rupee is paid. Such an order as has been stated above cannot be made under Ss. 41 and 42, Provincial

c Insolvency Act, though S. 39 (1) (c), Presidency Towns Insolvency Act, allows an order suspending discharge till a dividend of four annas in the rupee is paid to the creditors. The result therefore is that the order made by the District Judge should be set aside. The question for our consideration now is what should be the proper order made in the present case.

Mr. Gupta who appears for one of the creditors has stated to us that it is not necessary in the present case to suspend the discharge for a specified period and his client would be satisfied if an order is made in terms of S. 41 (2) (c), Provincial Insolvency Act. He says

d that certain conditions should be attached to the order of discharge as regards subsequent earnings and also as regards properties which he might acquire in the future by inheritance or otherwise. His suggestion is that with regard to the future earnings of the insolvent himself, he should be allowed a sum of Rs. 1200 a year for the maintenance of himself and his family and if there is anything in excess of that amount, then half of that amount should be handed over to the receiver for payment to his creditors till the creditors are paid eight annas in the rupee. With regard to properties which the insolvent might acquire in future by inheritance or otherwise, he suggests that so much of the properties should be handed over to the receiver as would satisfy the dues

of the creditors to the extent of eight annas in the rupee. Mr. Gupta does not say that this will continue for ever but suggests that it might be limited for a period of 10 or 12 years from this date. The Official Receiver and other creditors who have appeared separately through different advocates have left the matter entirely to us.

On a consideration of the circumstances of this case and keeping in mind the suggestion made by Mr. Gupta, the order which we desire to make is as follows: The insolvent will be granted a conditional discharge under S. 41 (2) (c), Provincial Insolvency Act. The discharge will take effect immediately subject to the following conditions: Whatever income the insolvent might make either from his trade, profession or calling or as profits of any property which he might acquire by inheritance or otherwise in future within a period of 10 years from this date, half of the amount that is in excess of Rs. 1200 a year should be paid to the receiver annually for the satisfaction of the dues of his creditors and these payments would not cease until the period of 10 years expires or the creditors receive payment to the extent of eight annas in the rupee. The insolvent will have to submit accounts to the receiver every six months showing the income he makes from all sources during this period. Nothing in our order will in any way prejudice the insolvent or the receiver to institute legal proceedings against creditor 1, Rai Bahadur Beldeodas Rameshwar in respect of securities which are said to be in his possession. We make no order as to costs.

Blank J. — I agree.

G.N.

Order accordingly.

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KHUNDKAR J.

Surendra Nath Sahu — Defendant 1 —
Appellant

v.

Bidhu Bhusan Panja and others —
Respondents.

Appeal No. 1145 of 1940, Decided on 20th July 1943, from appellate decree of Dist. Judge, Howrah, D/- 3rd June 1940.

(a) Malicious prosecution — Malice — Question of, does not arise until absence of reasonable or probable cause is shown.

In an action for malicious prosecution, the question of malice does not arise until a stage has been reached subsequent to that in which it has been determined that there was no reasonable and probable cause for the prosecution. [P 65g]

(b) Malicious prosecution — Reasonable and probable cause — Absence of — Initial burden

a lies on plaintiff — It is not however stationary but rolls from one party to another.

In actions for malicious prosecution, the onus of establishing absence of reasonable and probable cause to justify the defendant in launching the prosecution lies, in the first instance, on the plaintiff. The onus is not, however, a stationary burden. When the plaintiff has given such evidence as if not answered would entitle him to succeed, the burden of proof is shifted to the defendant. It is not a burden that goes on for ever resting on the shoulders of the person upon whom it is first cast. As soon as he brings evidence which, until it is answered, rebuts the evidence against which he is contending, then the balance descends on the other side, and the burden rolls over until again there is evidence which once more turns the scale. That being so, the question of onus of proof is only a rule for deciding on whom the obligation of going further, if he wishes to win, rests: (1883) 11 Q. B. D. 440, *Rel. on*; *Case law referred*.

[P 66f,g,h]

Chandra Sekhar Sen and Mahendra Kumar Ghose — for Appellant.

Apurba Charan Mukherjee and Rajendra Chandra Guha — for Respondents.

Judgment.—This appeal which is at the instance of a defendant arises out of a suit for malicious prosecution. The facts shortly stated are as follows: One Nagendrabala instituted a suit against Sailajakanta, brother of the appellant Surendra, on a mortgage in which the defence taken was that the bond **c** had been paid off and a receipt granted. The receipt was found to be a forgery, but at the appellate stage it was discovered that a document on which the plaintiff herself had relied had also been fabricated. This was a certified copy of a judgment in another suit in which two lines of type-writing had been introduced by way of addition to what the original judgment had contained. These additional lines were found to have been forged. Sailajakanta, the defendant in the mortgage suit, moved the appellate Court to make a criminal complaint against Nagendrabala and one Bidhu Panja who subsequently became the plaintiff **d** in the suit for malicious prosecution, and who is respondent in the present appeal. That application was refused. Then the present appellant Surendra, the defendant in the suit for malicious prosecution, filed a formal complaint in a Magistrate's Court charging several persons including respondent, Bidhu Panja with offences arising out of the act of falsifying the copy of the judgment which had been produced in Nagendrabala's suit. The persons accused were summoned but discharged. Against that order, Surendra moved the District Magistrate who caused Bidhu Panja to be committed for trial to the Sessions Court. Bidhu was tried on a charge of forgery under S. 466, Penal Code, but was acquitted by a jury whose verdict was unanimous.

Bidhu Panja then filed the present suit and obtained a decree which was affirmed on appeal. The case for the defendant-appellant in the Courts below was that he had been informed by two persons, Kirtibash and Manmatha, that the forgery had been perpetrated by Bidhu Panja, Kirtibash was the brother and Manmatha, the nephew of one Chuni who had acted as tadbirkar for Nagendrabala and who, it appears, actually filed the forged document in Court.

The Courts below have correctly stated the questions which arose for determination as being: (1) Whether criminal proceedings terminated in the plaintiff's favour; (2) whether the defendant acted on reasonable and probable cause; and (3) whether he acted maliciously. Both the Courts have decided these questions in the plaintiff's favour. Mr. Sen on behalf of the appellant has taken two points. Firstly he has contended that the Courts below have erred in virtually placing upon the defendant the onus of showing reasonable and probable cause. Mr. Sen urges that it was for the plaintiff to show absence of reasonable and probable cause and that he has failed to discharge this burden. In the second place, Mr. Sen has argued that the lower appellate Court erred inasmuch as it decided the case against the defendant on the finding that he had acted maliciously, whereas it should first have considered whether he acted without reasonable and probable cause. It would be convenient to take the second point first. It cannot be disputed that in an action for malicious prosecution, the question of malice does not arise until a stage has been reached subsequent to that in which it has been determined that there was no reasonable and probable cause for the prosecution. As regards this point, it is sufficient to say that a reading of the judgment of the appellate Court as a whole shows that all the three questions were found against the defendant. The appellate Court did, in fact, make a passing reference to the question of malice before entering upon a discussion of reasonable and probable cause, but it was only after it had decided the latter question that the Court really took up the question of malice, and this question has been gone into very thoroughly only in the concluding portion of the judgment of the appellate Court.

As regards the first point urged by Mr. Sen, his contention really was that the Courts below have approached the question of reasonable and probable cause from a wrong angle, because they have discussed at length the failure of the defendant to establish reason-

a able and probable cause without first considering whether the plaintiff had succeeded in showing that there was no reasonable and probable cause for the defendant to launch the prosecution. In support of this argument, Mr. Sen has drawn attention to the fact that the lower appellate Court has attached great importance to the failure of the defence to examine Kirtibash and Manmatha, the persons who, according to the defendant, informed him, that Bidhu Panja had committed the forgery. These two persons were examined as witnesses for the prosecution in the criminal trial. They, along with the appellant, were b defendants in the suit for malicious prosecution, but as against them the case was eventually withdrawn. Mr. Sen has relied upon a number of decisions which arose out of actions for malicious prosecution, and these may be briefly noted.

In (1883) 11 Q. B. D. 440,¹ it was laid down that the onus rests upon the plaintiff of proving the existence of such facts as tend to establish the want of reasonable and probable cause on the part of the defendant. The case in (1911) 2 K. B. D. 543² was one in which certain interrogatories which the plaintiff sought to administer to the defendants c were disallowed, and as certain other principles were involved in the decision, I am not sure that it is of direct importance here. (1938) 1 ALL. E. R. 1³ was cited for the purpose of drawing attention to the rule enunciated by Lord Atkin, that it is not required of a prosecutor that he must have tested every possible relevant fact before he takes action, and that his duty is not to ascertain whether there is a defence, but whether there is reasonable and probable cause for a prosecution. This case again has no direct bearing on the question of onus. In 49 I. C. 232,⁴ a Division Bench of this Court held that in order to d succeed the plaintiff must establish that the defendant had instituted the criminal proceedings without reasonable and probable cause and maliciously. 43 C. L. J. 521⁵ was a decision of the Privy Council in which Lord

Dunedin, after entering into the facts of the case, stated the position regarding onus in these words which appear at page 530 of the report :

"The appellants must, therefore, go the whole way. There is no halfway point of rest. They must show that Badri Sah invented the whole story as far as it implicated the appellants and tutored Raghunath and Teja to say it. That is a very heavy onus of proof, and unless they sustain it, the appellants must fail."

The case in 42 C.W.N. 1219⁶ was cited apparently as an instance of the application of the rule laid down in (1878) 8 Q.B.D. 167⁷ and in (1938) 1 ALL. E. R. 1³ which latter case has already been referred to.

The proposition that in actions for malicious prosecution, the onus of establishing absence of reasonable and probable cause to justify the defendant in launching the prosecution lies, in the first instance, on the plaintiff is well settled. The onus is not, however, a stationary burden. When the plaintiff has given such evidence as if not answered would entitle him to succeed, the burden of proof is shifted to the defendant. This has been laid down in (1883) 11 Q. B. D. 440¹ already noted above. A passage in the judgment of Bowen L. J. at p. 456 of the report stated the rule in these words :

"The test, therefore, as to the burden of proof or onus of proof, whichever term is used, is simply this: to ask one self which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case, for it is obvious that as the controversy involved in the litigation travels on, the parties from moment to moment may reach points at which the onus of proof shifts, and at which the tribunal will have to say that if the case stops there, it must be decided in a particular manner. The test being such as I have stated, it is not a burden that goes on for ever resting on the shoulders of the person upon whom it is first cast. As soon as he brings evidence which, until it is answered, rebuts the evidence against which he is contending, then the balance descends on the other side, and the burden rolls over until again there is evidence which once more turns the scale. That being so, the question of onus of proof is only a rule for deciding on whom the obligation of going further, if he wishes to win, rests." g

In this connexion the following cases may also be seen: 130 E.R. 1250⁸ and (1830) 109 E.R. 735.⁹

In the present case, the Courts below have not prefaced their discussion of the evidence with any expression of their intention to determine, in the first instance, whether the plaintiff had made out a *prima facie* case of

1. (1883) 11 Q. B. D. 440 : 52 L. J. Q. B. 620 : 49 L. T. 618 : 32 W. R. 50 : 47 J. P. 692, *Abrath v. North Eastern Ry. Co.*

2. (1911) 2 K. B. D. 543 : 80 L. J. K. B. 1313 : 104 L. T. 767 : 27 T. L. R. 473 : 55 S. J. 566, *Maass v. Gas Light and Coke Co.*

3. (1938) 1938 A. C. 305 : 107 L. J. K. B. 225 : 82 S. J. 192 : (1938) 1 All. E. R. 1, *Herniman v. Smith.*

4. ('19) 6 A.I.R. 1919 Cal. 134 : 49 I. C. 232, *Sowrendra Mohan Sinha v. Soshi Bhushan Koer.*

5. ('26) 13 A.I.R. 1926 P. C. 46 : 95 I. C. 329 : 29 O. C. 163 : 1 Luck. 215 : 43 C. L. J. 521 (P.C.), *Balbhadar Singh v. Badri Sah.*

6. ('38) 25 A. I. R. 1938 Cal. 829 : 180 I. C. 755 : I. L. R. (1939) 1 Cal. 123 : 42 C. W. N. 1219 : 69 C. L. J. 196, *Chatra Serampore Co-operative Credit Society Ltd. v. Becharam Sarkar.*

7. (1878) 8 Q. B. D. 167 : 51 L. J. Q. B. 268 : 30 W.R. 545, *Hicks v. Faulkner.*

8. 130 E. R. 1250: 6 Bing 186, *Williams v. Taylor.*

9. (1830) 1 B. & Ad. 128 : 8 L. J. (O.S.) K.B. 345 : 109 E.R. 735, *Cotton v. James.*

a absence of reasonable and probable cause on the part of the defendant. But Mr. Mukherji, on behalf of the respondent, has taken me through the judgments of the Courts below. I am bound to say that both show a correct appreciation of the evidence, and each Court has come to the conclusion upon the facts established, as well as upon the probabilities, that the defendant had no reasonable or probable cause for launching criminal proceedings. It is true that the appellate Court has adverted to the failure of the defendant to call evidence to show that he was justified in prosecuting the plaintiff, but a reading of the judgment as a whole makes it quite clear that the appellate Court was not regarding the initial burden as an onus which rested upon the defendant. In the trial Court's judgment, it was clearly shown that the story of Kirtibash and Manmatha giving to the defendant the information that Bidhu Panja had committed the forgery was in the highest degree improbable because they were men of Bidhu's camp. From the judgments of both Courts, it is further clear that these persons were disbelieved by the jury in the criminal trial. There are other indications in the trial Court's judgment that the appellant had, on the facts, established c reasonable and probable cause for believing that the respondent had committed forgery, and the indications given by the trial Court were not rejected by the lower appellate Court. It is clear that the appellate Court in its judgment of affirmance accepted all the conclusions of the trial Court. These conclusions which were based, as already stated, on the probabilities as well as on the established facts, did undoubtedly show absence of reasonable and probable cause and the defendant called no evidence to support his plea to the contrary. This appeal must, therefore, fail, and it is dismissed with costs to the plaintiff d respondent. Leave to appeal under Cl. 15, Letters Patent, is refused.

R.K.

*Appeal dismissed.***A. I. R. (31) 1944 Calcutta 67**

PAL J.

*Shek Basaraddi and others —**Defendants — Appellants*

v.

*Kroshali Taluqdar — Plaintiff —**Respondent.*

Appeal No. 847 of 1940, Decided on 18th February 1943, from appellate decree of Sub-Judge, 5th Court, Dacca, D/- 3rd February 1940.

(a) Bengal Tenancy Act (8 of 1885), S. 3 (17)
—Execution and signing of document — Dis-

inction—Words “document executed by him” in S. 3 (17)—Meaning of—Application by landlord under S. 26F admitting vendee's interest in land as raiyati with occupancy right is document executed within S. 3 (17).

To say that ‘a document was signed by A’ and that ‘a document was executed by A’ may mean somewhat different things. The former would convey the meaning that the act of signing was performed personally by the maker, while the latter imports that the maker either signed it himself or authorised someone to sign it for him. A document is executed, when those who take benefits and obligations under it have put or have caused to be put their names to it. Personal signature is not required, and another person duly authorized, may, by writing the name of the party executing, bring about the valid execution and put him under the obligations involved. The terms “signed by” and “executed by” may not therefore be equivalent, though the act of execution involves also the act of signing either by self or by an authorized person. ‘Execution’ designates the whole operation including signing and conveys the meaning of carrying out some act to its completion. The word may thus include the performance of three acts, signing, sealing and delivery, when sealing and delivery are needed for the completion of the document. When the document does not require sealing, its signing either by the executant himself or by some authorized person will complete its execution, and when so signed the document will be executed within the meaning of S. 3 (17). The words “any document executed by him” in S. 3 (17) cannot be read as “any document executed by him in favour of another.” An application signed and verified by the landlord under S. 26F admitting the vendee's interest in land sold as raiyati with occupancy rights amounts to the execution of a document by the landlord within the meaning of S. 3 (17) : (‘28) 15 A.I.R. 1928 P. C. 38, Rel. on. [P 70f,g,h; P 71a]

(b) Bengal Tenancy Act (8 of 1885), S. 3 (17)
—Operation and effect of.

The operation of S. 3 (17) is that as soon as it is proved that a person cultivates the land of another person under a system generally known as adhi, barga, or bhag, prima facie he is not a tenant. He cannot be held to be a tenant by any authority other than a civil Court, unless he has been expressly admitted to be a tenant as in proviso (i) or he has been held to be a tenant by a civil Court or is (now) held to be a tenant by a civil Court. In other words, if the question whether or not such a person is a tenant arises in a civil Court that Court can decide the question on evidence before it without the requirement of prior admission as prescribed by proviso (i) or of prior decision of a civil Court as prescribed by the first part of proviso (ii). This will be the effect of the words “or is” in proviso (ii). If, however, the question arises elsewhere, either before a Revenue Officer or in a rent Court or before any authority other than a civil Court, that authority is debarred from deciding the question unless either there is the required prior admission contemplated by proviso (i), or, the prior decision contemplated by the first part of proviso (ii) or any subsequent decision by a civil Court while the matter is still pending before that authority. This last proposition again follows from the words ‘or is’ in proviso (ii). The section as it now stands cannot be made to mean that as soon as either of the requirements of the proviso is present the person shall be held to be a tenant. The section does not intend to create any statutory tenancy.

[P 71b,c,d]

a (c) Bengal Tenancy Act (8 of 1885), Ss. 3 (17) and 26F—*A*, predecessor of defendants entering on plaintiff's land under labour kabuliat and continuing in possession after expiry of kabuliat—After *A*'s death his heirs defendants claiming to hold land as occupancy raiyat—Conduct of parties subsequent to expiry of kabuliat held relevant for determining existence and character of tenancy—Such conduct held conclusively established tenancy of defendants as raiyati occupancy—Defendants held acquired tenancy right also by adverse possession.

b The land in suit originally belonged to one *G* from whom it was purchased by the plaintiff. The defendants' predecessor *A* came on the land under the terms of the kabuliat dated 12th February 1893. The land was full of jungle when *A* came on it. He reclaimed it and made it culturable and remained in possession of the land even after the expiry of the term, and continued in possession till his death. About the year 1916, in the Cadastral Survey record *A* was recorded as having a raiyati with occupancy right in this land. On *A*'s death in about 1918, his heirs treated his interest in the land as heritable and treated it as an inheritance from him. In 1936, the plaintiff landlord instituted a suit for the recovery of his dues from the defendants in respect of the suit land in the rent file, it being Rent Suit No. 64 of 1936. In 1937 defendant 1 purchased the share of a daughter of *A* in the land on the footing that it was a raiyati and paid the landlord's fees as required under S. 26C as it then stood. The landlord on receiving notice of this sale under S. 26C made an application for pre-emption in 1938 in exercise of his right under S. 26F of the Act as it then stood, *c* obviously, on the footing that what was sold was a tenancy and was a raiyati :

d Held that it was not correct to say that the status of the defendants was determined by the kabuliat and consequently no subsequent admission of the plaintiff could alter that status. The kabuliat, according to the plaintiff's own case, was merely a contract whereby *A* agreed to give his labour in consideration of some wages. It would only explain how *A* came on the land. Even his possession after the expiry of the period covered by it could not be explained by that document standing by itself. Subsequent conduct of the parties would therefore be relevant consideration and would be retrospectant evidence of the legal relation which the parties intended to create between them after the expiry of the term of the kabuliat. Apart from the express admission, the pre-emption proceeding under S. 26F, itself implied an admission of the defendants' tenancy. These admissions coupled with the fact of several successive inheritances, the sale of 21st December 1937, the rent suit of 1936 and the further fact that in 1916 when both *G* and *A* were alive the interest of *A* was allowed to be recorded in the Cadastral Survey Record as that of an occupancy raiyat conclusively established the tenancy of the defendants ; [P 71*g,h*; P 72*a,b*]

Held further that as at least since 1916 *A* and after him his heirs had been in possession of the land in assertion of their tenancy right in it to the knowledge of the plaintiff and his predecessor-in-interest they had acquired a tenancy right in it also by adverse possession. [P 72*b,c*]

Phani Bhusan Chakravarti — for Appellants.

Jatindra Mohan Choudhury and Jatish Chandra Banerjee — for Respondent.

Judgment.—This appeal is by the defendants in a suit for the recovery of possession of a plot of land on declaration of the plaintiff's title thereto, and also for the recovery of Rs. 60 as the price of the plaintiff's share of the produce for three years. The land in suit measures about three kanis. Admittedly, it belonged to one Govinda. Govinda died leaving a widow and a will. The widow as executrix of this will sold the land to the plaintiff on 29th Falgun 1326 B. S. The plaintiff's title to this land by this purchase is no longer in dispute. Admittedly, the land has been in possession of the defendants from the time of their predecessor, Sk. Ahadi. The plaintiff's case is that Sk. Ahadi came on the land on a labour contract under a registered kabuliyat, dated 29th Magh 1299 B. S. (10th February 1893). The term of the contract expired in Kartic 1301 B. S. Ahadi, however, continued to cultivate the land as a labourer on the same terms till his death, and since his death, his heirs, the defendants, have been cultivating the land as labourers on the same condition. The plaintiff, no longer, considers it desirable to get the land cultivated by the defendants. The defendants claim the land as comprising their tenancy under the plaintiff, and their case is that the land was held by their predecessor Ahadi, and after him, by themselves in a tenancy right under the plaintiff's predecessor Govinda; and it was always so held by them since Govinda's death. The defendants claim the status of an occupancy raiyat in respect of their tenancy of the said land.

The Court of first instance held that the defendants had a tenancy in the land in suit, and, consequently, were not liable to eviction in this suit. It accordingly dismissed the plaintiff's prayer for recovery of khas possession. On appeal, the Court of appeal below reversed this decision, and decreed the plaintiff's claim for khas possession, holding that the defendants were mere labourers on the land.

The present appeal before me is directed against this decision, and the principal question that arises for consideration is whether the defendants have succeeded in establishing their tenancy in respect of the suit land. At the trial, the following facts transpired in evidence, and these are not now in dispute: (1) The defendants' predecessor, Sk. Ahadi came on the land under the terms of the kabuliyat, dated 29th Magh 1299 B. S. (12th February 1893). This kabuliyat is Ex. 1 in this case. (2) The land was full of jungle when Ahadi came on it. He reclaimed it and made it culturable. (3) Ahadi remained in possession of the land

a even after the expiry of the term, and continued in possession till his death. (4) About the year 1916, in the cadastral survey record Ahadi was recorded as having a raiyati with occupancy right in this land. (5) On Ahadi's death in about 1918, his heirs treated his interest in the land as heritable and treated this as an inheritance from him. (6) In 1936, the present plaintiff instituted a suit for the recovery of his dues from the defendants in respect of the suit land, and he instituted this suit in the rent file, it being Rent Suit No. 64 of 1936. (7) In 1937 defendant 1 purchased the share of a daughter of Ahadi in the land on the footing that it was a raiyati and paid the landlord's fees as required under S. 26C as it then stood. The landlord on receiving notice of this sale under S. 26C made an application for pre-emption in 1938 in exercise of his right under S. 26F, Bengal Tenancy Act, as it then stood, obviously, on the footing that what was sold was a tenancy and was a raiyati.

In coming to the conclusion that the defendants had a tenancy in the suit land, the learned Munsif relied on the conduct of the plaintiff in connexion with the pre-emption proceeding of 1938 and the rent suit of 1936, and observed that from the said conduct of the plaintiff, it might be said that the occupancy raiyati status of the defendants was admitted by the plaintiff. He also relied on the kabuliyat itself. According to him, the parties to the kabuliyat intended to create a tenancy, and this intention of theirs was substantiated by their subsequent conduct as also by the established purpose of the transaction as evidenced by the kabuliyat.

The learned Subordinate Judge, on appeal, held (1) that the kabuliyat, Ex. 1, clearly showed that the defendants' predecessor entered upon the land as a mere labourer burgadar. (2) That the statutory presumption arising from the entry in the cadastral survey record was rebutted by the kabuliyat itself referred to in the record as the basis of the entry. (3) That in the rent suit, the question whether the defendants had any tenancy in respect of the suit land was expressly left open. (4) (a) That the application for pre-emption under S. 26F, Bengal Tenancy Act, at best contained an admission by the plaintiff of the defendants' status as tenant. This admission was only a piece of evidence, and mere admission could not alter the status of the parties otherwise determined by law. (b) That this admission did not amount to an admission in a document executed by him within the meaning of S. 3 (17), proviso (i), Bengal Tenancy Act, as the documents mentioned in the sub-

clause are documents of title, like pottas, kabuliyats and the like. The learned Subordinate Judge further held that as the original contract had been proved in this case to be of a labourer burgadar, only, it was not permissible to go into the question of the subsequent conduct for ascertaining the intention of the parties.

Mr. Chakravarti, appearing for the appellants, contends : (1) That the Court of appeal below went wrong in holding that the application under S. 26F, Bengal Tenancy Act, was not a document executed by the plaintiff within the meaning of S. 3 (17), proviso (i), Bengal Tenancy Act. (2) That the application under S. 26F, Bengal Tenancy Act, admittedly signed by the plaintiff was a document within the meaning of S. 3 (17), proviso (i) and was executed by the plaintiff within the meaning of that section, and consequently, the admission of the tenancy in it is conclusive as to the existence of the tenancy under the section referred to above. (3) That the Court of appeal below went wrong in saying that the kabuliyat, Ex. 1, of 29th Magh 1299 B.S. was the kabuliyat on the basis of which the entry in the cadastral survey record was made. The kabuliyat referred to in the C. S. record was of a different date. (4) That in view of the admitted fact that the defendants themselves were no parties to the kabuliyat and inasmuch as the admitted possession of the defendants and their predecessor Ahadi after the expiry of the terms of the kabuliyat had to be explained, the Court of appeal below went wrong in holding that it was not permissible to go into the question of the subsequent conduct of the parties for ascertaining the intention of the parties. (5) That the transactions by which and the instances in which the right of tenancy was claimed, exercised and asserted by the defendants and recognised by the plaintiff were admissible in this case to prove the existence of the right under S. 13, Evidence Act. (5a) That the several successive inheritances, the sale of 21st December 1937, the pre-emption proceeding of 1938, and the rent suit of 1936 were such transactions and instances. (5b) That the evidence of these transactions and instances will fully prove the existence of the right. (6) That the above transactions and instances, along with the admissions involved in the rent suit of 1936, in the receipt, Ex. (a) acknowledging the payments of the decretal amount in the rent suit, as also in the present suit itself all go to establish the tenancy right. (7) That, in any case, the Court of appeal below should have held that the defendants, having been in possession in assertion of their raiyati right

a since the publication of the cadastral survey record in 1916 acquired the tenancy right by adverse possession for over twelve years.

Mr. Choudhury for the respondent contends:

- (1) That the onus being on the defendants to establish their tenancy in respect of the suit land, and it always having been their case that they were holding under the terms of the kabuliat Ex. 1, the construction of this kabuliyat is the only question that really falls to be considered and decided in this case. (2) That on a construction of the kabuliat, Ex. 1, the Court of appeal below held that the defendants were mere labourer burgadars, and that the kabuliyat bears no other construction. (3) That as according to the very case of the defendants, the legal relation between the parties was constituted by the transaction evidenced by the kabuliyat and as there is no ambiguity in the meaning and intention as expressed in the kabuliyat, the Court of appeal below was right in saying that the subsequent conduct of the parties was not admissible in evidence. (4) That S. 3 (17), proviso (i), Ben. Ten. Act, itself indicates that the document contemplated by the proviso is a document by one in favour of another; and that consequently, the application, Ex. C, under S. 26F, Ben. Ten. Act, was not such a document as is contemplated by S. 3 (17), proviso (i) of the Act. (5) That, in any case, S. 3 (17), Ben. Ten. Act, does not mean that as soon as the requirements of the proviso are satisfied, a statutory tenancy will be established; and that the fulfilment of the requirements of the proviso only removes the bar to the establishment of the tenancy, the tenancy yet remains to be established by evidence. (6) That the admissions, if any, involved in the pre-emption proceedings of 1938 and in the rent suit of 1936, were merely evidence against the plaintiff subject to any satisfactory explanation that might be offered by him; that he offered such explanation and that explanation was accepted by the final Court of fact. The decision in this respect cannot therefore be interfered with in second appeal. Section 3 (17), Ben. Ten. Act, defines the term 'tenant' thus:

" 'Tenant' means a person who holds land under another person, and is, or but for a special contract would, be, liable to pay rent for that land to that person :

Provided that a person who, under the system generally known as "adhi," or "barga" or "bhag," cultivates the land of another person on condition of delivering a share of the produce to that person, is not a tenant, unless—

(i) such person has been expressly admitted to be a tenant by his landlord in any document executed by him or executed in his favour and accepted by him, or

(ii) he has been or is held by a Civil Court to be a tenant."

The proviso was added by the Bengal Tenancy (Amendment) Act (Act 4 of 1928) which came into force on 21st February 1929. The application for pre-emption under S. 26F, Ben. Ten. Act, was made on 9th April 1938. This application is Ex. C in this case. It was verified and signed by the present plaintiff. In para. 2 of this verified application the plaintiff expressly admitted that the defendants' interest in the land was raiyati with occupancy right. According to the case of the plaintiff the defendants were the persons who under the system generally known as 'adhi' cultivated the plaintiff's land. If therefore the application, Ex. C, be a document executed by the plaintiff within the meaning of the above section, then the requirements of proviso (i) will be fully satisfied. Mr. Chakravarty refers me to S. 3 (13), Bengal General Clauses Act (B. C. Act 1 of 1899) which defines 'document.' The definition is comprehensive enough to include this application. Mr. Chowdhury, appearing for the respondent, draws my attention to the words in the proviso "executed in his favour and accepted by him" and contends that this shows which class of documents is contemplated by the section. According to him, only "documents by one in favour of another" are contemplated by this section. In other words, Mr. Chowdhury invites me to read the words "any document executed by him" as "any document executed by him in favour of another." I do not find any justification for thus reading words into the section that are not there.

In my opinion the document was executed by the plaintiff within the meaning of the section when he signed the same as his own document. To say that 'a document was signed by A' and that 'a document was executed by A' may mean somewhat different things. The former would convey the meaning that the act of signing was performed personally by the maker while the latter imports that the 'maker either signed it himself or authorised someone to sign it for him :

"A document is executed, when those who take benefits and obligations under it have put or have caused to be put their names to it. Personal signature is not required, and another person duly authorized, may, by writing the name of the party executing, bring about the valid execution and put him under the obligations involved."

The words 'persons executing' cannot mean 'persons signing.' They mean something more, namely, the person who by a valid execution enters into obligation under the instrument: 55 I. A. 81.¹ The terms "signed by" and "exe-

1. ('28) 15 A.I.R. 1928 P. C. 38 : 55 Cal. 532 : 55 I. A. 81 (P. C.), *Puran Chand v. Monmothath.*

a executed by" may not thus be equivalent, though the act of execution involves also the act of signing either by self or by an authorised person. 'Execution' designates the whole operation including signing and conveys the meaning of carrying out some act to its completion. The word may thus include the performance of three acts, signing, sealing and delivery, when sealing and delivery are needed for the completion of the document. When the document does not require sealing, its signing either by the executant himself or by some authorised person will complete its execution, and when so signed the document will
b be executed within the meaning of the section.

The question next to be considered is the effect of this admission on the question of the existence or otherwise of the alleged legal relation between the plaintiff and the defendants. The section has been quoted above. Its operation seems to be this: As soon as it is proved that a person cultivates the land of another person under a system generally known as adhi, barga, or bhag, prima facie he is not a tenant. He cannot be held to be a tenant by any authority other than a civil Court, unless—(1) he has been expressly admitted to be a tenant as in proviso (i) or (2) he has
c been held to be a tenant by a civil Court or (3) is (now) held to be a tenant by a civil Court. In other words, if the question whether or not such a person is a tenant arises in a civil Court that Court can decide the question on evidence before it without the requirement of prior admission as prescribed by proviso (i) or of prior decision of a civil Court as prescribed by the first part of proviso (ii). This will be the effect of the words "or is" in proviso (ii). If, however, the question arises elsewhere, either before a Revenue Officer or in a rent Court or before any authority other than a civil Court, that authority is debarred
d from deciding the question unless either there is (1) the required prior admission contemplated by proviso (i), or, (2) the prior decision contemplated by the first part of proviso (ii) or (3) any subsequent decision by a civil Court while the matter is still pending before that authority. This last proposition again follows from the words 'or is' in proviso (ii). In my opinion, the section as it now stands cannot be made to mean that as soon as either of the requirements of the proviso is present the person shall be held to be a tenant. The section does not intend to create any statutory tenancy. To read this intention into the section, we shall have to read for the words "is not a tenant, unless" the words "is a tenant, if." This will be reconstruction of the legis-

lative intention, not interpretation, and will be something worse than *interpretatio obrogans*. Without any such reconstruction the fulfilment of the requirements will only remove the bar so that the authority may now proceed to determine the question on evidence. If and when the tenancy will be found it will be a tenancy existing in reality and not a mere creature of the statute.

As regards the third point raised by Mr. Chakravarty, it may be pointed out that it is not the case of any of the parties that there was any second kabuliyat executed by Ahadi. On the other hand the defendants have all along relied on Ex. 1 as the only kabuliyat in the case. The date of the kabuliyat as given in the C. S. record was obviously a mistake.

The fourth contention of Mr. Chakravarty, however, must be accepted. The plaintiff never made the case that the defendants ever entered into any express agreement or arrangement with the plaintiff. It is not the case of the plaintiff that these defendants came on the land with the plaintiffs' permission. The land was recorded as comprising the tenancy of Ahadi. On Ahadi's death, the defendants came on the land as his heirs and held and possessed it openly in their own right as tenants by inheritance. Their possession
g was thus prima facie adverse. The learned Subordinate Judge was wrong in holding that the defendants came on the land under the terms of the labour kabuliyat Ex. 1. He was wrong in thinking that the status of the defendants was determined by the kabuliyat and consequently no subsequent admission of the plaintiff could alter that status. The kabuliyat, according to the plaintiff's own case, was merely a contract whereby Ahadi agreed to give his labour in consideration of some wages. It would only explain how Ahadi came on the land. Even his possession after the expiry of the period covered by it shall not be explained by this document
h standing by itself. Subsequent conduct of the parties will therefore be relevant consideration and will be retrospectant evidence of the legal relation which the parties intended to create between them after the expiry of the term of the kabuliyat.

The fifth and the sixth contentions of Mr. Chakravarty must also be accepted as correct. Ahadi died in 1325 leaving his son, defendant 1, and two daughters Aiyamannessa and Mullukjan. All these three persons took the property in question as their father's raiyati and possessed it by right of inheritance. Thereafter Mullukjan died and her husband, defendant 3, and son, defendant 2, came on the

a land as her heirs. These inheritances and successions were known to the plaintiff and his predecessor and they always accepted the position as will appear from the plaintiff's rent suit of 1936. Thereafter, Aiyamannessa sold her share to defendant 1 in 1937 who served notice on the plaintiff under S. 26C, Ben. Ten. Act. The plaintiff on this notice took out proceedings under S. 26F of the Act and in his application under that section expressly admitted that the interest of the transferor was that of an occupancy raiyat. Apart from this express admission the pre-emption proceeding under S. 26F itself implied an admission of the tenancy: *vide* S. 26I (4) of the Act. Mr. Chakravarty contends that these facts coupled with the further fact that in 1916 when both Gobinda and Ahadi were alive the interest of Ahadi was allowed to be recorded in the C. S. record as that of an occupancy raiyat conclusively establish the tenancy of the defendants. In my judgment this contention of Mr. Chakravarty is perfectly sound and must be accepted.

Then, again, there is no dispute that at least since 1916 Ahadi and after him his heirs have been in possession of the land in assertion of their tenancy right in it to the knowledge of the plaintiff and his predecessor-interest. They have thus acquired a tenancy right in it also by adverse possession. In the result this appeal is allowed with costs. The judgment and decree of the Court of appeal below are set aside and those of the first Court restored. The plaintiff will pay to the defendants their costs in the Court of appeal below also.

G.N.

*Appeal allowed.***A. I. R. (31) 1944 Calcutta 72**

HENDERSON J.

Babulall Choukhani — Petitioner

v.

Hariprosad Roy — Opposite Party.

Civil Rule No. 1103 of 1943, Decided on 24th August 1943, issued in matter of application for setting aside orders of Munsif, Second Court, Alipore (24-Parganas), D/- 16th and 23rd July 1943.

(a) Practice — Pleadings — Amendment — Amendment seeking to raise case under words "any cause which may be deemed satisfactory by the Court" in Calcutta House Rent Control Order 1943 — Amendment held could not be struck out as scandalous until words in order were interpreted.

In a suit for ejectment against the tenant the landlord by amending the plaint sought to raise a case under the words "any cause which may be deemed satisfactory by the Court" in the Calcutta House Rent Control Order by alleging that the defendant was a most troublesome, recalcitrant, vexatious and dishonest tenant who gave the plaintiff as much

trouble as possible by withholding payment of rent and by raising various false and dishonest pleas when the plaintiff was compelled to file suits against him for recovery of the same and it was most desirable that he should be evicted from the premises in suit :

Held that until the words in the Calcutta House Rent Control Order under which the plaintiff sought to raise a case were interpreted judicially it was impossible to strike the amendment out of the plaint on the ground that it was irrelevant or scandalous.

[P 73a,b]

C. P. C. —

('40) Chitaley, O. 6, R. 17, N. 7.

('41) Mulla, Page 599, Pts. (o) and (p).

(b) Practice — Pleadings — Amendment — Amendment whether bona fide — Test.

No doubt an application for amendment based on false allegations cannot be bona fide. But a prayer for amendment of the plaint due to the introduction of a new order which was not in force when the plaint was filed cannot be rejected on the ground that it was not made bona fide.

[P 73b]

C. P. C. —

('40) Chitaley, O. 6, R. 17, N. 7 ; N. 9, Pt. 8 ; N. 10, Pt. 1.

('41) Mulla, Page 599, Pts. (o) and (p).

(c) Calcutta House Rent Control Order (1943), S. 9 (1) Proviso — Proviso when comes into operation—Amendment raising case under proviso (c) before it comes into operation is misconceived.

The House Rent Control Order has been made for the protection of tenants. It is not correct to say that the proviso gives the landlords a new cause of action and that even though the plaintiff landlord fails on his original case he may obtain a decree for ejectment by making out a case within the proviso. The proviso to S. 9 (1) does not come into play until S. 9 (1) to which it is a proviso has been invoked by the tenant defendant. Consequently, in a suit to eject the tenant an application by the plaintiff landlord seeking to amend the plaint by raising a case under S. 9 (1) proviso before the defendant has invoked S. 9 (1) is misconceived.

[P 73c,e,f]

C. P. C. —

('40) Chitaley, O. 6, R. 17, N. 10.

('41) Mulla, Page 591 Note "Leave to amend when given."

Phani Bhusan Chakravarti—for Petitioner.*Sudhansu Kumar Sen*—for Opposite Party.

Order. — This rule has been obtained by the defendant against an order allowing an amendment of the plaint. It raises a question of pleading in connexion with the application of the Calcutta House Rent Control Order. The amendment was made in order to make out a case under cl. (c) of the proviso to S. 9 (1) of the Order and is in these terms :

"That the defendant is a most troublesome recalcitrant, vexatious and dishonest tenant who gives the plaintiff as much trouble as possible by withholding payment of rent and by raising various false and dishonest pleas when the plaintiff is compelled to file suits against him for recovery of the same and it is most desirable in the interest of your petitioner that he should be evicted from the premises in suit and further the plaintiff bona fide requires the premises for his own occupation for locating the expanding order supplying business of the plaintiff's son."

a The learned Munsif has not given any reasons for allowing the amendment. On the merits it is contended that the application for amendment should have been rejected as introducing scandalous allegations and made mala fide while the last part undoubtedly raises a case within the proviso, the introductory part appears to be mere padding couched in rather offensive terms. Mr. Sen explained that the first part was intended to raise a case under the words "any cause which may be deemed satisfactory by the Court." Those words require judicial interpretation, and until they are so interpreted, it is impossible to strike this allegation out of the plaint on the ground that it is irrelevant or scandalous.

Upon the contents of the application the contention of the petitioner is that the allegations are false. Of course in one sense an application for amendment based on false allegations cannot be bona fide. That, however, is a matter for investigation at the trial itself. The prayer for amendment was due to the introduction of this order which was not in force when the plaint was filed. It is, therefore, impossible to reject it on the ground that it was not made bona fide.

c On this view, it becomes necessary to consider whether as a matter of pleading the amendment should have been allowed. This implies that the proviso gives landlords a new cause of action and that, even though the plaintiff fails on his original case, he may obtain a decree for ejectment by making out a case within the proviso. This would indeed be a strange provision to find in an order which was obviously made for the benefit of tenants. The effect is really the opposite; protection is given to a tenant who apart from the provisions of this order would be liable to ejectment. It is, therefore, for the defendant and not the plaintiff to raise the question. Whether this should be done by a formal application to amend the written statement or by a petition it is not now necessary to decide. Suffice it to say, that disputed questions of fact may arise and that in whatever form this defence may be raised the plaintiff will be entitled to every opportunity to meet it. The point to note now is that it is only when it succeeds that it becomes necessary for the plaintiff to put forward a case under the proviso.

It is apparent that there may be some difficulty in practice in dealing with S. 9. It appears from its terms that it applies both to execution proceedings and to suits. It might certainly lead to inconvenience if a suit were dismissed under this section without a deter-

mination of the real dispute between the parties and it may be, as Mr. Chakravarti suggested, that the proper course would be to keep such a suit pending and decree it later if the defendant by his subsequent conduct disentitles himself to the protection of the order. Be that as it may, the defendant has not yet attempted to take advantage of the section and, until he does so, no question with regard to it will arise for consideration. He may be quite confident that he will win the suit on the merits and may not desire to invoke the help of this order.

To sum up, the proviso in connexion with which the prayer for amendment was made does not come into play until the sub-section to which it is a proviso has been invoked by the defendant. The application for amendment of the plaint was accordingly misconceived. The rule is made absolute. The order of the Munsif is set aside. The plaintiff's application for amendment of the plaint will be rejected. The plaintiff will pay the costs of the petitioner in this rule; hearing fee three gold mohurs.

G.N.

*Rule made absolute.***A. I. R. (31) 1944 Calcutta 73**

BLANK J.

Akshoy Kumar Banerjee — Plaintiff
— Appellant

v.

Mahammad Hedayatulla and others
— Respondents.

Appeal No. 943 of 1940, Decided on 1st June 1943, from appellate decree of Sub-Judge, 24 Parganas, 2nd Court at Alipore, D/- 15th February 1940.

Bengal Municipal Act (15 of 1932), S. 138—Mutation — Applicant can be called to produce documents of title.

Considering the scheme of the Act and the language of S. 138, a municipality has powers under the Act to call for documents of title in order that it may be in a position to consider an application for mutation according to law, that is, to have all the materials before it which it considers it reasonably requires. [P 74g ; P 75g]

Phani Bhusan Chakravarty — for Appellant.

Abdul Quasem (No. 2) — for Respondent.

Judgment. — The facts from which this appeal arises are not disputed. The plaintiff's case is that he purchased certain lands within the Tollygunge Municipality from the recorded owner by a kobala dated 3rd September 1936. On 7th September 1936, plaintiff applied for mutation of his name in the municipal records. The transferor gave notice of the transfer by letters dated 2nd December 1936 and subsequent dates. On 17th September 1936, the municipality asked the plaintiff "to

a produce documentary evidence to prove his title to the property." This is a printed form suggesting that the request to produce documentary evidence is the usual procedure. On 30th September 1936, the plaintiff produced the kobala before the overseer Bishnupada Mitra. The plaintiff produced his document again on 15th January 1937 and 3rd July 1937, in both cases before the Vice-Chairman. On 13th August 1937, the Chairman wrote to the plaintiff to produce his document once more. Thereafter the plaintiff sued for certain declarations of which declarations, that he is an assessee of the Tollygunge Municipality and b entitled to be mutated as such in the municipal registers, are now material.

The defendant municipality raised certain issues of fact, none of which are now material. It also raised a number of issues of law. The trial Court found that the plaintiff had cause of action and that the suit was maintainable under S. 42, Specific Relief Act, and that the plaintiff was entitled to the declarations as mentioned above. The Court of Appeal below observed that the contest on appeal was not on facts that the defendant contended that the suit was not maintainable; that the plaintiff was bound to produce his document of c title under the law; that there was no cause of action and that the suit was barred under S. 42, Specific Relief Act. The Court of Appeal below observed at the outset that

"the crux of the whole case depended on the question whether the municipality had any right to call for the title deed from the plaintiff with regard to his petition for mutation."

The learned Subordinate Judge discussed the argument in considerable detail but his finding came back ultimately to the starting point. The hearing in this Court has followed very much the same course. The Court of Appeal below found that as the municipality had not refused to mutate and as the case d was still pending the plaintiff had no cause of action; further that the municipality had powers under the Act to call for the document of title; and that the finding of the learned Munsiff

"there is no evidence that the municipality has denied the plaintiff's right to mutation or has disposed of the mutation case"

stood unchallenged by either party and consequently that S. 42, Specific Relief Act, is a bar to the suit.

In this Court the learned advocate for the appellant opened his arguments by contending that the defendant municipality was not entitled as of right to demand production of the document. He submitted that as there was no direct provision in the Municipal Act,

on the principle that where a corporation is created by statute the powers of the corporation are to be found within that statute it followed that the defendant municipality had no right to insist on production of the document. The learned advocate admitted however that there was no judicial decision applying that principle to facts such as those from which the present case arose. Apart from the lack of authority for the proposition, that where a corporation is called upon to alter an entry in its registers the corporation cannot as of right require the person asking the alteration to satisfy it that everything is in order, it will be seen, from the discussion f of the relevant sections of the Municipal Act that the municipality must be held to be impliedly authorised to call for documents in order to satisfy itself even although the statute does not expressly authorise the municipality to do so. The learned advocate for the appellant, during the course of his arguments drew my attention to the correspondence between the plaintiff and the defendant municipality. One of these letters is relevant in this connection, namely Ex. 1 (M), dated 2nd April 1937, where the municipality asked for the document " . . . so that the question of mutation can be considered according to law g by the Commissioners at a meeting." It is certainly a proposition which would require affirmative authority to support it, that a municipality is not as of right entitled to call for papers in order that it may be in a position to consider an application according to law, that is, to have all the materials before it which it considers it reasonably requires.

The learned advocate for the appellant was at pains to discuss the relevant sections of the Bengal Municipal Act. He referred to ss. 144 and 138. The discussion of S. 144 is less material on the course the hearing has followed. Section 138 is more material. The h power to mutate is vested in the Commissioners at a meeting, not in the Chairman, the Vice-Chairman or anyone else purporting to act on behalf of the Commissioners. Further when considering the "substitution for the name of the owner of any holding of the name of any person who has succeeded by transfer or otherwise to the ownership of the holding" questions of ownership, questions of the person in whom the ownership vests after the transfer and questions of transfer arise. Apart from these questions which necessarily arise other questions, which may also arise on the facts of particular cases, do not appear to be excluded. Under S. 138 (2) the Commissioners have to "give at least one month's

a notice to any person interested of any alteration which the Commissioners propose to make" and sub-s. (3) prescribes a somewhat elaborate procedure for the subsequent stages. These stages do not however concern us in the present case.

The learned advocate for the appellant submitted that applying these provisions to the facts of the present case, there was nothing to be done by the municipality between the receipt of notice of the transfer from the transferor and the transferee and the issue of notice under S. 138 (2). He was at considerable pains to argue that the correspondence between the parties showed that the municipality had all the information in their possession which they required, in order to deal with the application for mutation, without calling on the plaintiff to produce his deed of transfer. He urged that the transferor and the transferee had both given notice, so that the municipality was *prima facie* satisfied that there had been a transfer and that as between owners; he pointed out that the printed form Ex. 1 (K), dated 17th September 1936, described the holding as "No. 78 Russa Road East, Southern" and that subsequent letters also gave the same description. He further submitted that notices given by the transferor and the transferee described the land as being the entire balance of the holding remaining on the municipal assessment and collection registers so that no question of holding or no holding arose. Here, however, the learned advocate appears to speak with incomplete accuracy. On reference to the documents I find that they use the expressions the balance, or residue, of the lands at Digambaritala. My attention has not been drawn to anything indicating that this description corresponds with the description in the municipal registers.

Thus it is not, in my view, possible to say a that the papers before the municipal authorities showed that the holding or the remainder of the holding was being transferred and that the only question which arose was the question of changing the name of the holder which could and should have been dealt with without insisting on production of the title deed. Apart from the question, however, it seems to me that the scheme of the section is that, as the learned advocate for the respondent put it, the Commissioners in making a mutation act in a quasi-judicial manner. Once this position is arrived at it follows that the Commissioners have a discretion, which no doubt must be exercised in a reasonable manner, to call for such evidence as they think fit. It appears that it is a usual practice to call for

documents of title and it cannot be held a priori unreasonable that the Commissioners should call for documents of title in order to satisfy themselves that the transaction is regular on the face of the papers with particular reference to the responsibility of the Commissioners for the collection of the rates charged on holdings. The scheme of the section is that the matter of mutation has to go before the Commissioners at a meeting. Before this stage can be reached, there are two preliminary stages; first, the Commissioners have to arrive at the stage where they propose to make a mutation, and secondly the Commissioners have to give at least one month's notice before making the mutation. Before the Commissioners arrive at the stage of proposing to make a mutation, the Chairman, the Vice-Chairman and the officers and servants of the Commissioners act in aid of the obligations placed on the Commissioners by law when they collect such information as the Commissioners, as a matter of practice, require for the purposes stated. Indeed the learned advocate for the appellant frankly conceded that the word "propose" in S. 138(2), Bengal Municipal Act, did not assist his contention. In my view, therefore, the Court of appeal below rightly held that the municipality had powers under the Act to call for the document of title. The reasons on which it held that it had such powers are certainly open to some criticism, but I do not propose to discuss in detail the criticisms which the learned advocate for the appellant levelled against the reasons advanced by the learned Subordinate Judge as I hold that his conclusion is right on a consideration of the scheme and the language of the section.

This disposes of what is admittedly the crux of the case. Certain other arguments were however advanced and require to be treated if only briefly. The learned advocate for the appellant referred to S. 92(1) (c) of the Act and argued that in the present case there was more than an irregularity not affecting the merits. He submitted that the merits had been affected because the municipality by insisting on the production of the document had in effect refused mutation. The argument however does not commend itself to me. First, the refusal is not unconditional; the plaintiff could have complied with the condition by producing the document once more when the basis of the implied refusal would have disappeared. Secondly, on the view I have taken it cannot be held that the condition was irregular. The learned advocate dwelt on the harassment which had been caused to his

a client by the repeated requests of the municipality for the production of the title deed. While fully agreeing that the municipality has not treated the appellant in a business-like manner I cannot hold that the action of the municipality goes to the extent of being unreasonable or highly improper. The appellant appears to labour under a sense of grievance, but not all grievances give causes of action. The argument was developed from another aspect, that of S. 42, Specific Relief Act, and the learned advocate submitted that the insistence on production of the document amounted to a denial that the appellant was b entitled to the legal character he now claims. Here again the argument goes part of the way but not all of the way. There is no denial of the legal character. All that has happened is that the decision of the question relating to the legal character is suspended until the plaintiff complies with the demand to provide prima facie evidence, which the body vested with the decision of the question calls for, for the purpose of the said decision. Both Courts have held "that there is no evidence that the Municipality has denied the plaintiff's right to mutation or has disposed of the mutation case."

c It is not necessary to decide whether this is a finding of fact or of law or of mixed fact and law; suffice it to say that if it is a finding of law it is in my view a correct finding. On the finding, S. 42, Specific Relief Act, has been correctly held by the Court of appeal below to be a bar to the suit.

The appeal is therefore dismissed. The question of costs causes me some difficulty. On the one hand the plaintiff came to Court prematurely. No doubt his patience was exhausted but his recourse against the municipality was not exhausted. Thereby he has caused a good deal of expense to the rate payers. On the other hand the action of the municipality cannot be described as exemplary. I cannot refrain from observing that d the plaintiff has the sympathy of the Court. I do not however think it would be proper to interfere with the directions of the Court of appeal below as to costs, on the findings at which it arrived. The parties will therefore pay their own costs in this Court.

R.K.

Appeal dismissed.

* A. I. R. (31) 1944 Calcutta 76

DERBYSHIRE C. J. AND LODGE J.

*Leo Zepantis on behalf of "the detenu"**Nicholas Schinas — Petitioner*

v.

Emperor.

Misc. Case No. 13 of 1943, Decided on 29th January 1943.

* Criminal P. C. (1898), S. 491—Greek seaman coming to India and landing with permission — He having claim against ship-owner for his illness—Claim not being settled, suit by him in Calcutta High Court — Forcible removal for being repatriated to Egypt—It held amounted to lawlessness on part of ship's agent, the police and the Greek Consul [Warning given to persons concerned].

One S, a Greek, came to Calcutta as a sick seaman and landed with proper permission. He was suffering from asthma and bronchitis and he as well as the agents of the ship's owners, thought that he had a claim against the owners of the ship in respect of his illness. Both he and the ship's agents believed that it was of some value because there were negotiations for a settlement. Those negotiations came to nothing and S began proceedings in the Calcutta High Court. He was forcibly removed for being repatriated to Egypt by a Greek Steamer leaving Calcutta :

Held that not under any law or regulation having the force of law was there any power residing in anybody except the Central Government to order S's removal from India to Egypt. Perhaps the Provincial Government or a proper Court of law might have ordered it. Each one of these authorities would no doubt have taken into consideration the state of S's health and the fact that he had a claim which he was prosecuting against the owners of a ship in respect of damage to his health. None of these matters have been taken into consideration. The Greek Consul had no right in Calcutta to order his removal from Calcutta; the ship's agents had no right to order his removal from Calcutta; the police had no right to order his removal from Calcutta 9 unless they did it under an authority from the Central Government, or perhaps the Provincial Government or a proper Court of law. The police had no such authority; the Greek Consul had no such authority; the ship's agents had no such authority. This was therefore a piece of lawlessness on the part of the ship's agents, the police and the Greek Consul. But as S had gone out of the jurisdiction (ship having left) the Calcutta High Court could not help him. [P 79e,f,g]

[The Chief Justice hoped, that case would be a warning to those who were like minded to take the law into their own hands where they had no right to do so.]

F. Surita — for Petitioner.

J. N. Mazumdar, Standing Counsel and Jatin- h
dra Mohan Chowdhury — for the Crown.

Derbyshire C. J.—On 26th January 1943, an application was made by Mr. Surita on behalf of his client, Leo Zepantis of Stephen House, Dalhousie Square, Calcutta, under S. 491, Criminal P. C., in respect of one Nicholas Schinas who was described as a Greek national formerly residing at 3A Ripon Street, Calcutta, who it was alleged had been arrested by officers of the Calcutta Police Force at that address at about 1 P. M. on 24th January 1943 and removed therefrom by the police officers. There was an allegation that Schinas was a sailor and that he might have been put on board a ship. Accordingly the same day we issued a rule calling upon

a the Commissioner of Police, Calcutta, to produce Nicholas Schinas in Court on 28th January 1943 and to show cause why an order should not be made under S. 491, Criminal P. C., in respect of Nicholas Schinas and why Nicholas Schinas should not be set at liberty.

The proceedings under S. 491, Criminal P. C., are analogous to those known as habeas corpus proceedings in England. The rule was served on the Commissioner of Police the same afternoon being received on his behalf by Mr. Sircar, who is a Deputy Commissioner of Police at 4.30 P. M., on 26th January 1943. On 28th January 1943, the Standing Counsel b appeared in this Court to answer the rule. Mr. Surita appeared for the applicant. The matter was urgent and the Standing Counsel, though he had not the ordinary instructions that counsel is accustomed to have, was in possession of a file of correspondence relating to this matter. It was a file produced from the custody of that department of the Commissioner of Police — the Security Control Department—which deals with these matters. The learned Standing Counsel was quite frank and placed the whole of the correspondence before us with the exception of one or two documents which he has put in to-day, and c throughout these proceedings, I think it is only right to say, the police themselves have given the Court every assistance, and they have not, as far as I can see, kept anything back.

The correspondence to which I have referred has been copied and we have had the opportunity of going through it. It gives a history of this matter from the beginning of 1942. Nicholas Schinas is a Greek, 39 years of age; we are not told from what part of Greece he hails or when he was last in Greece. He appears to have been a ship's steward. Some-time in 1940 or 1941 he signed on as a steward d on board the "S. S. Ronin" at New York. The "S. S. Ronin" was flying the Panama Flag. The "S. S. Ronin" arrived in Calcutta about June 1941, and, on its arrival in Calcutta, it was taken over by the Ministry of War Transport with a view to its being used for other purposes and the crew was discharged. Nicholas Schinas went into hospital and was there for a period of three weeks or more. He was discharged from hospital, but appeared to be suffering from some chest trouble. He was paid some maintenance by the ship's agents or the agents of the former owners of the ship, Messrs. Lionel Edwards, Ltd. It appears from a letter written in January 1942, by Messrs. Lionel Edwards that Nicholas Schinas suffered intermittently from asthma and bronchitis, that

the doctor attending him was of opinion that e he was unfit for general sea duties, and that the cost of maintaining Schinas was approximately Rs. 200, a month, and that both the ship's agents and Schinas wished to come to a settlement which would be in satisfaction of all future claims against the owners by Schinas. They wished the Security Department of Police to allow Schinas to remain in India. What they said was this :

"Should we be able to agree on a figure of compensation, we shall be glad to know if this man will be allowed to remain in India, as we appreciate that we cannot conclude any negotiations should the authorities not permit him to remain.

Should the Security Control Department insist f that the man leaves, we shall be grateful if any assistance could be given to us as we have been up to this time been unable to repatriate him to any port."

Apparently the ship's agents continued to support Schinas and there were some negotiations for a settlement. The Greek Consul General in Calcutta seems to have been in touch with the ship's agents and also with the Security Department of the Calcutta Police. Both the Greek Consul General and the agents wrote to the police. It does not appear that the police had any direct communication with this man. At any rate it does not appear from the correspondence. Negotiations g for a settlement appear not to have been successful and the question of repatriating this Greek arose. Who first raised it seems difficult to say from the correspondence: it may have been the ship's agents, it may have been the Greek Consul General or it may have been the police. They all seem to have thought that something in that way should be done.

Schinas himself got a passport from the Greek Consul General in November 1941. That was never vised for India and did not entitle him to stay in India. Whether he came to shore with a dock pass or a special h permit or under a general permit given to ship's master when the crew was discharged it does not appear. He certainly came ashore with the permission of those responsible for admitting foreigners into the country. The remainder of the crew had been provided with other occupation and had gone away, but Schinas remained. He was no longer in hospital. He was waiting to settle up his claim against the ship's owners through the ship's agents. A certificate was given by a doctor who examined him at the instance of the ship's agents to the effect that he was suffering from asthma and bronchitis and would never improve if he remained in Bengal. Both the ship's agents and the Consul at

a one time wished to get Nicholas Schinas a passport vised to enable him to go to South Africa for the benefit of his health, but there were difficulties and that proposal fell through. About the end of 1942, the question of his being repatriated came to the fore again. The police moved in the matter, and wrote to the ship's agents suggesting that arrangements should be made for his repatriation without further delay. On 28th October 1942, the ship's agents wrote to the Assistant Commissioner of Police as follows :

6 "In the circumstances we request you to please inform the Greek Consul General that the man cannot be allowed to remain any longer in India and that he should arrange for his early repatriation to the present seat of the Greek Government in Egypt. We shall be pleased to meet the Consul General's expenses for such repatriation."

On 7th November 1942, the officer-in-charge of the Security Control Department wrote back to the agents saying :

"I write to inform you that Mr. Schinas must be repatriated from Calcutta without any further delay and you may negotiate direct with the local Greek Consulate General, to whom a copy of this letter is being sent."

c About the beginning of January 1943, a Greek vessel was in port and on 5th January 1943, an officer of the Security Control Department wrote to the Consul General asking him to take steps to arrange for the departure of Mr. Schinas and there was a reply to that, and correspondence went on between the agents, the Consul General and the police. On 20th January 1943, the agents wrote to the Greek Consul General saying :

"We have been in communication with the Deputy Commissioner of Police, Security Control, Passport Department, who inform us that it is essential that the man in question should leave India by one of the vessels mentioned in your letter. They state that in the event of any disinclination on the part of Schinas to proceed on board, they will be pleased to arrange to put him on the vessel at your request."

d On 23rd January 1943, the Consul General wrote to the Master of a certain boat, "S. S. Maria L" which was then in Calcutta, as follows :

"As per instructions by the police, the seaman Nicholas Schinas should be put on board of the first available steamer sailing from Calcutta and be repatriated to Egypt. As your steamer is the first leaving this Port, I request you to take the man on board and repatriate him to Egypt. In case your steamer is not going to the above destination you will hand him over to our Consular Authorities in Aden with a request to send him further to Egypt. The necessary papers to this effect will be given to you. As for the expenses, landing guarantee etc., please arrange with the firm, Messrs. Lionel Edwards Ltd."

On the same day the Consul General wrote to Schinas as follows :

"In continuation of my letter dated 30th November 1942 and in compliance with police instructions, I have issued orders to the Master of "s. s. Maria

L" to take you on board and repatriate you to Egypt. You are therefore requested to comply with the above orders and be on board before to-morrow noon, the 24th instant, failing which you will be brought by the police on board. Your passport is handed over to the Master of "s. s. Maria L."

On the same day the Consul General wrote to the Deputy Commissioner of Police, Security Control Office, as follows :

"I have the honour to inform you that I have issued instructions to the Master of "s. s. Maria L" to take on board the seaman Nicholas Schinas for deportation to Egypt as per your order. This order has been handed over to Messrs. Lionel Edwards Ltd. to do the needful. In case Mr. Schinas refuses to comply with the order, I request you to kindly put him on board the steamer to-morrow, as the steamer is expected to leave on Monday morning at about 6 o'clock."

What happened on 24th January 1943, is told by the report which Sergeant Ryan made, to his superiors in the police. It is signed 25th January 1943 :

"Re. Seaman, Nicholas Schinas. As ordered Sgt. Machride and myself accompanied a representative of Lionel Edwards with a view to putting on board the "Maria L" the abovementioned seaman. In this connexion we went to 45 Karnani Mansions as this was the given address; on arriving it was ascertained that no such person was known, so our next call was at the "V" Restaurant where he was known to have his meals; he was ultimately picked up here and then taken to 13 Marques St. so as to enable him to gather his belongings, then to Sudder St. where he gathered some more of his personal effects, and then to 3 Garden Reach Jetties where he was put on board and a receipt obtained by the Chief Officer, all correspondence about Nicholas Schinas is attached."

The receipt in question has been produced and is headed "s. s. Maria L." It is in these terms : "Received on board Mr. Nicholas Schinas for repatriation to Egypt." It is signed by some one who is the Chief Officer and is dated 24th January 1943. On 26th January 1943, a letter was written to the police at a port in another part of India. The text of it was :

One Mr. Nicholas Schinas was on board a ship which left Calcutta for yours. Please take steps to prevent him from leaving that vessel whilst in your port."

It was signed by some one for the Deputy Commissioner of Police, Security Control, Calcutta. On 25th January 1943, the Solicitors of Mr. Schinas, Messrs. Asoke Mitra & Co., received a letter (an affidavit has been filed that it is in Schinas' handwriting) to the following effect :

"With big surprise I see to-day the Calcutta Police to take me by force and send me to the ship "Maria L" for I don't know where I go. I think we go to the Colombo and after to the Egypt. I please you make the necessary possible to coming me back at Calcutta and put the affair against the company Lionel Edwards to the Court very soon. I hope at yours hands please telephone to the Navy House to take me out from the ship to-morrow morning or to-night. My expulsion is coming from the Consul

Greek and not from the police or Government Bengal. Please go very soon to save me. With respect your client.

N. Schinas.

P. S. Keep my papers well please because I coming back a day to see you."

I ought to mention that on 7th January 1943, a plaint claiming damages or compensation was filed in this Court by Nicholas Schinas who is described as residing at 3A Ripon Street, Calcutta against Namezee, owner of a steam-ship named "S. S. Ronin," carrying on business within the jurisdiction of the Court through his agents, Lionel Edwards Ltd. Mr. Zepantis who petitioned the Court in the first instance is apparently a friend of Nicholas Schinas and he has caused these proceedings to be taken. We are told that the ship sailed on the morning of 25th January, and that she is now well away from Calcutta. I am satisfied for my part that the ship is well away from Calcutta out of the jurisdiction of this Court and that Nicholas Schinas is on that ship. There is very little that we can do to help Nicholas Schinas at the moment. He came here as a sick seaman and he landed with proper permission. As far as can be seen, he was suffering from asthma and bronchitis and he appears to have thought, as indeed did the agents of the ship's owners, that he had a claim against the owners of the ship in respect of his illness. That claim may be a good claim or it may not. Apparently, both he and the ship's agents believed that it was of some value because there were negotiations for a settlement. Those negotiations came to nothing and Schinas began proceedings in this Court. By reason of his removal from Calcutta he will not be able to go on with those proceedings. It may be that he will never arrive at a place where he can bring those proceedings against the owners of the ship. He has lost that advantage which he had here in Calcutta. He is still suffering from asthma and bronchitis and both he and the ship's agents and at one time the Greek Consul were of the opinion that a visit to South Africa would benefit his health. He had no right to stay in Calcutta indefinitely but if he had left Calcutta when he had cleared up his own affairs and possibly got some compensation, and left it voluntarily, he could have gone to a place where his health might have benefited. The ship's agents thought that he would be of no further use as a seaman. But he might have benefited in health if he had been allowed to leave India and go to a place which was good for his health. He was not allowed to stay here

to prosecute his claim: he was not allowed to go to the place which would have benefited his health; he was put on a boat for repatriation to Egypt where the Greek Government is at present situate.

Calcutta is a part of India. There are still laws administered in the Courts of this country in spite of the various regulations and various pieces of legislation termed Emergency Legislation which have been passed. Not under any law or regulation having the force of law to which our attention was drawn was there any power residing in anybody except the Central Government to order this man's removal from this country to Egypt. Perhaps the Provincial Government or a proper Court of law might have ordered it. Each one of these authorities would no doubt have taken into consideration the state of this man's health and the fact that he had a claim which he was prosecuting against the owners of a ship in respect of damage to his health. None of these matters have been taken into consideration. The Greek Consul had no right in Calcutta to order his removal from Calcutta; the ship's agents had no right to order his removal from Calcutta; the police had no right to order his removal from Calcutta unless they did it under an authority from the Central Government, or perhaps the Provincial Government or a proper Court of law. The police had no such authority; the Greek Consul had no such authority; the ship's agents had no such authority. In my opinion, this was a piece of lawlessness on the part of the ship's agents, the police and the Greek Consul. I regret that we are not in a position to help this man as he is out of the jurisdiction, but I hope this case will be a warning to those who are like minded to take the law into their own hands where they have no right to do so. This Rule is discharged. Let the affidavits of George John Adamson and Denis Robert Ryan on behalf of the opposite party, the letter of Nicholas Schinas dated 24th January 1943, and the affidavit of Leo Zepantis, the petitioner, filed in Court to-day, be kept on the record.

Lodge J.—I agree.

R.K.

Rule discharged.

A. I. R. (31) 1944 Calcutta 79

EDGLEY AND DAS JJ.

*Jitendra Mohan De and another
Accused—Petitioners*

v.

Emperor.

Criminal Revn. No. 351 of 1943, Decided on 8th July 1943.

- a* Civic Guards Ordinance (8 of 1940), S. 4 and S. 8, Rules under, R. 7 — Order calling out members of Civic Guard on duty not notified in Calcutta Police Gazette under R. 7—Resistance to arrest attempted to be made by members does not constitute offence under S. 353, Penal Code.

It is only when a member of the Civic Guard has been called out under S. 4 that he is entitled to have the same powers, privileges and protection as a Police Officer "appointed under any Act for the time being in force." Rule 7 is quite clear to the effect that any order calling out the Civic Guard to duty must be notified in the Calcutta Police Gazette. Until and unless this mandatory provision of R. 7 is observed, it cannot be said that the Civic Guard has been called out for duty, and its members cannot, therefore, legally perform any of the functions with which

- b* Police Officers are specially invested under the law. It follows that, until such time as the Civic Guard has been legally called out for duty and the order calling them out for duty has been notified in the Calcutta Police Gazette, the members of the Civic Guard are merely empowered to perform duties which an ordinary citizen may perform, and are invested with the further duties mentioned in R. 5 of the Rules regarding regular attendance at parades and lectures, and they are also required to obey lawful orders of their superior officers. Nor can it be said that members of the Civic Guard were in actual possession of the situation of police officers within S. 21, Expl. 2, Penal Code, until they had been legally called out for duty under the terms of Ordinance 8 of 1940 read with the Rules. Consequently, when the order calling out the members of the Civic Guard on duty was not notified in the Calcutta Police Gazette as required by R. 7 the members cannot be said to have been called out on duty within S. 4 and hence resistance to arrest attempted to be made by them cannot constitute an offence under S. 353, Penal Code.

[P 81g,h ; P 82a,b,c]

Anil Chandra Roy Choudhury and Ashoke Nath Mukherjee — for Petitioners.

Amiruddin Ahmad, Deputy Legal Remembrancer — for the Crown.

- Edgley J.*—This Rule is directed against the decision of the learned Sessions Judge, 24-Pergannas, dated 11th February 1943, whereby he affirmed the conviction of the petitioners by Mr. Ahammed, Magistrate of Alipore, under S. 41, Calcutta Suburban Police Act (2 of 1866) and S. 353, Penal Code. The admitted facts of the case are briefly as follows: On the night of 10th August 1942, at about 10 P.M. the petitioners were found drinking and quarrelling at a place near the Kalighat Temple. They were seen by some members of the Civic Guard who asked them to desist, but, as they refused to do so, they were arrested. They then ran away to take shelter in a dala shop where they were followed by the members of the Civic Guard. An affray took place in the shop during the course of which a slight injury was inflicted on one of the Civic Guards. The petitioners were in due course placed on their trial before Mr. Ahammed and were convicted as already mentioned.

In the first place, it has been argued by the learned advocate for the petitioners that they should not have been convicted under S. 41, Calcutta Suburban Police Act (2 of 1866). With regard to this point, however, it appears that they were charged with having been guilty of riotous behaviour in a public street. There are findings of fact in the judgment of the learned Magistrate to the effect that they were actually guilty of such behaviour, and these findings appear to have been accepted by the learned Sessions Judge. With regard to this point, we do not think that there is any substance in the contention which has been put forward on behalf of the petitioners. The most important point which has been raised in this case is in connexion with the conviction of Jogendra Mohan De under S. 353, Penal Code. With regard to this aspect of the case, the learned advocate for this petitioner contends that his client's conviction was illegal in view of the fact that the members of the Civic Guard who attempted to arrest him were not public servants within the meaning of S. 21, Penal Code. He further maintains that, even if it could be argued that they were public servants, the Civic Guard had never been called out for duty under the provisions of S. 4 of Ordinance 8 of 1940, and that, in these circumstances, the Civic Guards who attempted to arrest the petitioner could not be said to be acting in the execution of their duty within the meaning of S. 353, Penal Code.

Certain papers have been placed before us by Mr. Ahmad on behalf of the Crown on the basis of which he contends that the Civic Guard in Calcutta has been properly constituted under Ordinance 8 of 1940 with effect from 26th April 1941. He also argues that these papers indicate that the Civic Guard had been duly and properly called out for duty as required by S. 4 of the Ordinance read with paras. 5, 6 and 7 of the rules framed thereunder. The first of these papers on which Mr. Ahmad relies is a letter, dated 26th April 1941, which was addressed by the Commissioner of Police to the Deputy Secretary to the Government of Bengal in the Home Department. In that letter, the Commissioner of Police states that he had been directed to institute a Civic Guard Patrol in the City of Calcutta, that for this purpose the City had been divided into 208 beats and that six Civic Guards would be allotted to each beat. He further stated that this scheme was being put into force from the evening of 26th April. He mentioned the amount of expenditure that would be incurred by the institution of the

a scheme and asked that funds might be placed at his disposal. On the following day, the Commissioner of Police appears to have prepared some notes under the heading "Civic Guard Patrols" in which he dealt in some detail with the general organisation of the Civic Guard. He also purported to give certain instructions to the members of the Civic Guard in regard to their general duties and behaviour. On this point, the Commissioner of Police stated :

"They are intended to be a visible symbol of law and order with all the powers of Government behind them. They must inspire law abiding citizens with confidence and give bad characters a reminder that new forces have been arranged against them. They must pay no attention to abuse or jeers and must keep an unruffled demeanour always. On no account are they to adopt an aggressive attitude, or to make any kind of 'investigations' on their own account. The chief duty of a patrol is to watch. Their mere presence on the streets acts as a preventive."

In para. 7 of these notes, the Commissioner of Police proceeded to answer various questions which had been put to him as to the circumstances which demanded rigorous action. The learned Deputy Legal Remembrancer has referred us in particular to question 3 and the answer thereto, which are as follows :

"If we see two people fighting what shall we do ?
Answer. Talk to them quietly and ask them to go home. Do not shout at them or argue with them. If they persist in bawling and disturbing the neighbourhood, arrest them and take them to the nearest police officer or police station. Note time, date and place of occurrence in your note book."

Having regard to the above-mentioned notes recorded by the Commissioner of Police, the learned Deputy Legal Remembrancer asks us to hold that the members of the Civic Guard were public servants within the meaning of S. 21, Penal Code, and that, when they attempted to arrest the petitioner, Jogendra Mohan De, they were acting in the execution of their duty as such public servants. In our view, the decision with reference to this point must depend on whether or not, the Civic Guards had been properly called out under the provisions of S. 4 of Ordinance 8 of 1940. This section is in the following terms :

"The District Magistrate in a District or the Commissioner of Police in a Presidency Town may at any time call out a member of the Civic Guard for training or to discharge any of the functions assigned to the Civic Guard in accordance with the provisions of this Ordinance and the rules made thereunder."

It may be noted that it is only when a member of the Civic Guard has been called out under S. 4 that he is entitled to have the same powers, privileges and protection as a police officer "appointed under any Act for the time being in force." (Section 5.) Section 8 of the Ordinance empowers the Provin-

cial Government to make rules consistent with the Ordinance

"(c) regulating the organisation, appointment, conditions of service, duties, discipline, . . . of the Civic Guard and the manner in which they may be called out for service."

The relevant rules are Rr. 6 and 7 of the Rules issued under Notification No. 422Pl.D, dated 26th October 1940. Rule 6 (1) is in the following terms :

"6 Civic Guards may be called out on duty: (1) to assist the regular police force in the protection of the civil population against the forces of crime and disorder;"

Rule 7 provides that :

"in Calcutta only the Commissioner of Police may call out the Civic Guard for duty and such orders shall be notified in the Calcutta Police Gazette."

It is, of course, possible to argue in this case on the basis of the above-mentioned notes that the Commissioner of Police intended that the Civic Guard should be called out for duty with effect from 26th April 1941. The fact remains however that this calling out for duty was not in compliance with the provisions of S. 4 of the Ordinance read with para. 7 of the above-mentioned rules because admittedly the orders calling out the Civic Guard for duty have not been published in the Calcutta Police Gazette as required by that rule. Under S. 8 of the Ordinance, as already pointed out, there is a provision to the effect that Government may make rules as to the manner in which the Civic Guard may be called out for service. The language of R. 7 which is one of the rules made by Government under S. 8 of the Ordinance is quite clear to the effect that any order calling out the Civic Guard to duty must be notified in the Calcutta Police Gazette. In our view, until and unless this mandatory provision of R. 7 is observed, it cannot be said that the Civic Guard has been called out for duty, and its members cannot, therefore, legally perform any of the functions with which police officers are specially invested under the law. It follows that, until such time as the Civic Guard has been legally called out for duty and the order calling them out for duty has been notified in the Calcutta Police Gazette, the members of the Civic Guard are merely empowered to perform duties which an ordinary citizen may perform, and are invested with the further duties mentioned in para. 5 of the rules regarding regular attendance at parades and lectures, and they are also required to obey lawful orders of their superior officers.

Mr. Ahmad has argued that the members of the Civic Guard who attempted to arrest Jogendra Mohan De should be regarded as having been in actual possession of the situa-

a tion of police officers within the meaning of Explan. (2) of S. 21, Penal Code, and that in view of the terms of this explanation, they should be held to be public servants under S. 21 (7) of the Code which applies to every person who holds any office by virtue of which he is empowered to place or keep any person in confinement. We are not prepared to accept this contention. In our view, it cannot be said that members of the Civic Guard were in actual possession of the situation of police officers until they had been legally called out for duty under the terms of Ordinance 8 of 1940 read with the rules, and we must hold that b having regard to the mandatory provisions of R. 7, the Civic Guard had not been called out on duty as the orders purporting to call them out had not been notified in the Calcutta Police Gazette.

In view of what has been stated above, the members of the Civic Guard had no authority to arrest Jogendra Mohan De, because, in the circumstances of this particular case, Jogendra Mohan De could only have been arrested by a police officer in accordance with the provisions of S. 43, Calcutta Suburban Police Act (2 of 1866). It follows, therefore, c that the prosecution have not been able to show that Jogendra Mohan De committed any offence under S. 353, Penal Code. As the members of the Civic Guard who attempted to arrest him had not been properly and legally called out for duty, they were not authorised to exercise any of the special powers of a police officer, and Jogendra Mohan De was, therefore, justified in resisting arrest. The result is that the conviction of the petitioners is affirmed under S. 41, Calcutta Suburban Police Act (2 of 1866), but we think d that the ends of justice will be served by reducing the period of their sentences to the periods of imprisonment already undergone. e As regards the conviction of Jogendra Mohan De under S. 353, Penal Code, we set this aside and direct that Jogendra Mohan De be acquitted of the charge under that section. Both the petitioners will be released from their bail-bonds.

Das J.—I agree.

G.N.

Order accordingly.

A. I. R. (31) 1944 Calcutta 82

MITTER AND BLANK JJ.

Mahiuddin Biswas — Petitioner

v.

Gopi Charan Mondal—Opposite Party.

Civil Revn. Case No. 1075 of 1941, Decided on 23rd July 1943, for setting aside order of Sub-Judge, Addl. Court, Maldah, in Misc. Case No. 7 of 1941.

Bengal Money-Lenders Act (10 of 1940), Ss. 2 (22) and 36—Mortgage decree—Creditor appearing under S. 13, Bengal Agricultural Debtors Act, and filing claim — Whether and when mortgage decree can be re-opened, explained.

A proceeding under the Bengal Agricultural Debtors Act is a proceeding for a recovery of a loan by the creditor, even when the application is not made by that particular creditor under S. 8 (2) of that Act, but when that creditor appears in pursuance of a general notice published under S. 13 and files before the board particulars of his claim, for the board can include his claim in its award whether he agrees to the settlement or not. Such a proceeding amounts to a suit to which the Bengal Money-Lenders Act applies and any award made by the board can be reopened, if affected by provisions of the Bengal Money-Lenders Act, but for S. 36, sub-s. (1), proviso f (ii), which protects such awards. Where the debtor, however, seeks to re-open the decree passed in the mortgage suit, he cannot re-open it, unless it can be said that the mortgage suit was pending on or after 1st January 1939. The meaning of sub-s. (22) of Section 2 is that a particular suit would still be considered to be a suit to which the Act would apply though it had terminated in a final decree before 1st January 1939, if any proceeding in connexion with that suit was pending on 1st January 1939, or had been instituted since then. An independent proceeding pending on or instituted after 1st January 1939—that is to say, a proceeding entirely unconnected with that particular suit—would not bring that suit within the scope of the Bengal Money-Lenders Act though that independent proceeding may relate to the same loan which was the subject-matter of that g suit. [P 83e, f, h; P 84a, b, c]

Gopendra Nath Das and Jagadish Chandra Ghose — for Petitioner.

Dr. N. C. Sen Gupta and Shoilendra Nath Majumdar — for Opposite Party.

Order.—This rule raises a question, which so far as we are aware, has not yet been decided. The question is whether a suit for recovery of a loan would be taken to be a suit to which the Bengal Money-Lenders Act applies by reason of the fact that the decree-holder had filed a statement of claim after 1st January 1939, on the basis of his decree to a Debt Settlement Board (hereafter called the h Board) established under the Bengal Agricultural Debtors Act in pursuance of a notice issued under the provision of S. 13 of that Act, the debtor having applied to settle his debts under S. 8. It would be unnecessary to decide the other questions raised before us, if this question be answered in the negative.

The opposite party, Gopi Charan Mondal, filed a suit in 1933, to enforce two mortgages executed in his favour by the petitioner, one on 21st January 1921, which secured a loan of Rs. 381, and the other on 11th July 1927, which secured another loan of Rs. 946. The properties mortgaged consisted of eight items of immovable property. The rates of interest stipulated are in excess of those allowed by

^a S. 30, Bengal Money-Lenders Act. On 31st July 1935, he obtained a final decree for Rs. 2930 odd on account of principal and interest, besides costs. The amount for which the final decree was passed is also in excess of what can be allowed under the Bengal Money-Lenders Act.

The opposite party took out execution and at the execution sale purchased six out of the eight items of mortgaged property on 22nd December 1936, for the sum of Rs. 2500. That sale was confirmed in 1937 and possession was taken by him on 25th April 1937. That execution thus came to an end in 1937. He has ^b not since then applied for further execution.

On 25th June 1938, the judgment-debtor applied under S. 8, Bengal Agricultural Debtors Act, to a Debt Settlement Board established under that Act for settlement of his debts. He filed a statement in the form provided for in S. 11 of that Act, but in that statement he did not mention the opposite party as one of his creditors. In pursuance of the general notice issued under S. 13, the opposite party filed a statement on 11th February 1939, wherein he stated that a sum of Rs. 1178 odd was still due to him on the mortgage decree which was passed in his favour on 31st July 1935. On the Bengal Money-Lenders Act coming into force on 1st September 1940, the debtor did not proceed with his application before the Debt Settlement Board, which was dismissed for default some time in the year 1941. On 14th January 1941, he made an application under S. 36, Bengal Money-Lenders Act, for re-opening the mortgage decrees. The learned Subordinate Judge has dismissed the said application by his order dated 19th June 1941. The debtor applied to this Court and has obtained the aforesaid rule.

^a The first question therefore is whether the mortgage suit, is a suit to which the Bengal Money-Lenders Act applies. It was instituted before 1st January 1939, and had terminated in a final decree before that date. No execution proceedings were pending on 1st January 1939. The question accordingly resolves itself into the question as to whether the mortgage suit can be said to be pending on that date in view of the definition given in S. 2 (22) of that Act. The portion of that section which is relevant for this case runs thus :

"Suit to which this Act applies means any ... proceeding filed on or after the 1st day of January 1939, or pending on that date for the recovery of a loan advanced before ... the commencement of the Act."

By this definition the ordinary meaning of a suit is extended. A suit ordinarily means a proceeding started in a civil Court on a plaint.

It terminates with the decree. By the definition, as given in S. 2 (22), a suit includes any proceedings for the recovery of a loan—a proceeding for execution of the decree or any other proceeding. Such a proceeding need not be on the basis of a plaint, nor be before the civil Court. A proceeding before the Debt Settlement Board, would come within the definition if it be for the recovery of a loan by the creditor.

The first question therefore is whether a proceeding under the Bengal Agricultural Debtors Act is a proceeding for a recovery of a loan by the creditor, when the application is not made by that particular creditor under S. 8 (2) of that Act, but when that creditor appears in pursuance of a general notice published under S. 13 and files before the Board particulars of his claim. In our view it would be a proceeding for recovery of the loan due to him, for the Board can include his claim in its award, whether he agrees to the settlement or not. The procedure is laid down in S. 19. If he agrees to the proposal of the debtor, the agreement has to be recorded by the Board in writing. If he does not agree to the debtor's offer and that offer is considered to be fair by the Board, the Board can still settle the debt in terms of S. 19, sub-s. (1), cl. (b). The ⁹ debt so settled is to be included in the award to be made by the Board under S. 25 and the award can be executed, if the debtor fails to pay up in terms of that award (S. 28). Where the debtor is insolvent, an award has to be made under S. 22 and all the properties of the debtor, subject to some exceptions, have to be sold and the proceeds applied for satisfaction of his debts as settled. The creditor can ultimately recover his loan, though scaled down, through the machinery provided for in the Bengal Agricultural Debtors Act. A proceeding before the Debt Settlement Board either started by the creditor, or in which the ^h creditor had filed a claim under S. 13, when the proceedings had been started by the debtor, would be a "suit to which the Bengal Money-Lenders Act applies," if it was pending on or started after 1st January 1939. In the case before us as the proceeding was pending before the Board after 1st January 1939, that proceeding amounts to a suit to which the Bengal Money-Lenders Act applied and any award made by the Board could have been re-opened, if affected by provisions of the Bengal Money-Lenders Act, but for S. 36, sub-s. (1) proviso (ii), which protects such awards. The debtor here, however, seeks to re-open the decree passed in the mortgage suit, and he cannot re-open it, unless it can be

a said that the mortgage suit was pending on or after 1st January 1939.

In ordinary parlance a suit terminates with the decree passed by the original Court. If there is an appeal, the suit can be said to be still pending till that appeal is disposed of, on the ground that an appeal is regarded as the continuation of the suit. The Bengal Money-Lenders Act makes that position clear by sub-s. (21) of S. 2. It is also clear, as we have already held, that the definition in the Bengal Money-Lenders Act enlarges the ordinary conception of a suit. It would include a proceeding in execution. In our judgment the meaning of sub-s. (22) of S. 2 is that a particular suit would still be considered to be a suit to which the Act would apply, though it had terminated in a final decree before 1st January 1939, if any proceeding in connexion with that suit was pending on 1st January 1939 or had been instituted since then. An independent proceeding pending on or instituted after 1st January 1939—that is to say, a proceeding entirely unconnected with that particular suit—would not bring that suit within the scope of the Bengal Money-Lenders Act, though that independent proceeding may relate to the same loan which was the subject-matter of that suit. In this view of the matter the mortgage decrees cannot be re-opened by reason of the first part of proviso (ii) to S. 36 (1) of the Act.

We accordingly hold that the petitioner's application under S. 36, Bengal Money-Lender's Act, for re-opening the mortgage decree was not maintainable. If the mortgagee decree-holder later on applies to execute his decree or applies for a personal decree the debtor would then have the right to make an application under S. 36, but we express no opinion as to the nature or extent of the relief that he would be entitled to have, as we have not expressed any opinion on the other questions that had been raised before us. The result is that this rule is discharged but without costs.

R.K.

Rule discharged.

A. I. R. (31) 1944 Calcutta 84

RAU AND MUKHERJEA JJ.

Calcutta Landing and Shipping Co., Ltd.—Plaintiff — Appellant

v.

Victor Oil Company Ltd.—Defendant—Respondent.

Appeal No. 907 of 1942, Decided on 13th July 1943, from appellate decree of Dist. Judge, Howrah, D/- 3rd February 1942.

(a) Transfer of Property Act (1882), S. 110—Applicability—Verbal lease.

(Per *Rau J.—Obiter*) Under S. 107 of the Act, a lease of immovable property can in certain cases be made only by a registered instrument but in all other cases leases may be made either by a registered instrument or by oral agreement accompanied by delivery of possession. Therefore the word "expressed" in S. 110 means "expressed" either in the registered instrument or in the oral agreement by which the lease is made. The word "expressed" does not necessarily imply expression in writing. Section 110 therefore applies to a lease created by oral agreement as well as to one created by a registered instrument. The last paragraph of S. 110 which speaks of the lease omitting to mention at whose option it is terminable does not necessarily imply that the section contemplates a written lease. An oral agreement may omit to mention a thing just as much as a written instrument. [P 85f.h]

(Per *Mukherjea J.*)—Section 110 does not apply to verbal leases and is confined to written leases only: ('32) 19 A.I.R. 1932 P. C. 279; ('34) 21 A.I.R. 1934 Cal. 837 and 42 C. W. N. 1115, *Ref.* [P 87h]

(b) Transfer of Property Act (1882), S. 110—Interpretation of.

(Per *Rau J.—Obiter*) The rule laid down in S. 110 is not inflexible, whether for written or verbal leases. Section 110 must be read as subject to the qualification "unless the context otherwise requires:" 1940 A. C. 613, *Rel. on.* [P 86b]

Section 110 attempts to render certain, what in England would have been a matter of some doubt, and lays down the artificial rule of construction that where a lease is said to commence from a certain date, it means from the end of that date and will have another day added on at the end : 42 C. W. N. 1115, *Rel. on.* [P 87c]

T. P. Act —

('43) Chitaley, S. 110 N. 1 Pt. 7.

('36) Mulla, Page 634, Note "Computation of time."

(c) Transfer of Property Act (1882), S. 106—Month in S. 106 means British Calendar month (Per *Rau J.*)

According to the General Clauses Act, 1897, which reproduces the definition given by S. 2 (4), General Clauses Act, 1868, the word 'month' in S. 106, T. P. Act, must mean a month reckoned according to the British calendar. [P 86c]

T. P. Act —

('43) Chitaley, S. 106 N. 42.

(d) Transfer of Property Act (1882), S. 110 first para.—Applicability (Per *Mukherjea J.*)

The first para. of S. 110 contemplates, that a time or period should be limited by the lease and the period must be expressed to commence from a particular date. When both these conditions are fulfilled the rule of interpretation laid down in the paragraph applies and in computing the period that day is to be excluded. [P 88a]

T. P. Act —

('43) Chitaley, S. 110 N. 1.

(e) Transfer of Property Act (1882), Ss. 106 and 110 — Verbal lease of godown by plaintiff for three years from 1st June 1936—Defendant taking possession on 1st June 1936—No registered instrument — Notice to quit to end on expiry of 1st December 1940 — S. 110 held not applicable — Lease held governed by S. 106—Notice held bad (Per *Rau and Mukherjea JJ.*)

^a There was a verbal agreement between the parties to the effect that the defendant would take a lease of the plaintiff's godown for a period of 3 years "from 1st June 1936" on a monthly rent of Rs. 250. The defendant went into possession on 1st June 1936 and had been in possession ever since. A written lease had been contemplated but none was actually executed. The rents had all along been paid according to the months of the English calendar. On 13th November 1940, the plaintiff served a notice upon the defendants to give up possession of the premises "on the expiry of 1st December 1940":

^b *Held* that as the lease in question could be created only by a registered instrument and no such instrument was executed, the verbal agreement for a term of three years from 1st June 1936 must be ignored. As no time was fixed by the lease itself there would be no question of expressing it to begin from a particular date and hence S. 110 had no application. The tenancy was governed by S. 106 being from month to month according to English calendar. As the defendant went into possession on the first day of a calendar month, namely 1st June 1936, the notice to quit should have ended with a calendar month. As the plaintiff's notice was expressed to end on expiry of 1st December 1940, it was invalid. [P 86b,c,d; P 88d,e]

T. P. Act —

('43) Chitale, S. 105 N. 31; S. 106 N. 40 Pt. 1.

('36) Mulla, Page 589 Pt. (a).

S. M. Bose, Gopendra Nath Das and Sailendra Nath Mitra — for Appellants.

Atul Chandra Gupta and Bhuban Mohan Saha (Jr.) — for Respondents.

^c **Rau J.**—This appeal is by the plaintiffs, the Calcutta Landing and Shipping Co. Ltd., in a suit for ejectment and mesne profits brought against the respondents, the Victor Oil Co., Ltd. The facts are briefly these: There was a verbal agreement between the parties to the effect that the defendant company would take a lease of the disputed godown for a period of 3 years "from 1st June 1936" on a monthly rent of Rs. 250. The defendant company went into possession on 1st June 1936 and has been in possession ever since. A written lease had been contemplated but none was actually executed. On 13th November 1940, the plaintiff company served ^d a notice upon the defendants to give up possession of the premises "on the expiry of 1st December 1940." Both the Courts below have held that this was not a valid notice under s. 106, T. P. Act. Hence this second appeal. The sole question raised before us is as to the validity of the notice. The sections to be considered are ss. 106 and 110, T. P. Act. The relevant portions of these sections run thus:

"Section 106.—In the absence of a contract or local law or usage to the contrary a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year terminable on the part of either lessor or lessee by six months notice expiring with the end of a year of the tenancy, and a lease of immovable property for any other purpose shall be deemed to be a lease from

month to month terminable on the part of either lessor or lessee by fifteen days notice expiring with the end of a month of the tenancy."

"Section 110.—Where the time limited by a lease of immovable property is expressed as commencing from a particular day, in computing that time such day shall be excluded. Where no day of commencement is named the time so limited begins from the making of the lease.

Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary the lease shall last during the whole anniversary of the day from which such time commences.

Where the time so limited is expressed to be terminable before its expiration and the lease omits to mention at whose option it is so terminable, the lessee and not the lessor shall have such option."

Both the Courts below have held that S. 110 ^f has no application except to a written lease. I shall first comment on this point. Under S. 107, T. P. Act, a lease of immovable property can in certain cases be made only by a registered instrument but in all other cases leases may be made either by a registered instrument or by oral agreement accompanied by delivery of possession. Ordinarily therefore the word "expressed" in S. 110 would seem to mean "expressed" either in the registered instrument or in the oral agreement by which the lease is made. I am not quite convinced that the word "expressed" necessarily implies ^g expression in writing. For example, s. 7 (2), Contract Act, indicates that in order to convert a proposal into a promise the acceptance must be "expressed" in some usual and reasonable manner; clearly this applies to verbal as well as written acceptances. By way of contrast, I may notice s. 25 (1) of the same Act which provides that an agreement made without consideration is void unless it is expressed in writing and registered under the law for the time being in force. Thus, where the Legislature means expression in writing, it may be expected to say so in plain terms. Nor am I quite convinced that the last paragraph of ^h S. 110 which speaks of the lease omitting to mention at whose option it is terminable necessarily implies that the section contemplates a written lease. An oral agreement may omit to mention a thing just as much as a written instrument. On the language of S. 110 it is not therefore clear to me that it cannot apply to a lease created by oral agreement as well as to one created by a registered instrument. The provision is really in the nature of an interpretation clause and it would be plainly inconvenient to have one dictionary for written words and another for words spoken. If, for example, it were proved in a particular case that a lease for one year had been made by oral agreement in which the term had been

a expressed to commence from 1st January, it would be difficult to hold that the term should be computed in a manner different from that prescribed by S. 110.

Nor am I satisfied that the rule laid down in the section is inflexible, whether for written or verbal leases. If, for example, a written lease provides that it is for a term of three years commencing from 1st January 1946, and ending on 31st December 1948, both days inclusive, it would be impossible to apply the rule laid down in section 110 without making the lease self-contradictory. As observed by Viscount Maugham in 1940 A. C. 613¹ at p. 621, some
b such phrase as "unless the context otherwise requires" is often necessarily implied in statutory definitions even where it is not expressly inserted, and it may well be that S. 110 must be read as subject to a similar qualification.

However, in this particular case it is not necessary for me to decide any of these points. Here there was a verbal agreement for a term of three years from 1st June 1936. Such a lease can only be created by a registered instrument. No registered instrument having been executed, the verbal agreement has to be ignored. It is not possible to sever the words
c "from 1st June 1936" from the term which they were meant to limit and to hold that the words are good while the term is bad. Both have to be rejected. The case would then fall to be governed by S. 106, T. P. Act, and the lease must therefore be deemed to be a lease from "month to month." According to the General Clauses Act, 1897, which reproduces the definition given by S. 2 (4), General Clauses Act, 1868, the word 'month' in this section must mean a month reckoned according to the British calendar. Therefore, the lease must be held to be a lease from month to month according to the British calendar. There is no dispute that the defendant company went into
d possession on the first day of a calendar month, namely, 1st June 1936. The notice to quit should therefore have ended with a calendar month. Instead of this it was expressed to end on the expiry of 1st December. Much as I regret to have to decide the case on a technicality, I do not think that there is any alternative but to dismiss the appeal. In the circumstances of the case the parties must bear their own costs throughout.

Mukherjea J. — This appeal arises out of an action in ejectment commenced by the plaintiff-appellant to recover khas possession

of the premises in suit on the allegation that the defendant was a monthly tenant in respect to the same, and the tenancy was determined by a notice to quit. The material facts lie within a very short compass and may be stated as follows: The premises in suit which is a godown at Howrah belongs to the plaintiff company. There was an arrangement come to between the plaintiff and the defendant under which the latter agreed to take a lease of the godown for a period of three years with effect from 1st June 1936, at a monthly rental of Rs. 250. The defendant actually occupied the godown on 1st June 1936, but no lease was executed and registered in accordance with the agreement, and the result was that the defendant continued to hold the premises as a tenant from month to month. On 13th November 1940, the plaintiff served a notice to quit upon the defendant asking the latter to vacate the godown on the expiry of 1st December 1940. As the defendant did not comply with this notice, the present suit was instituted.

The substantial defence raised on behalf of the defendant company was that the notice to quit was insufficient in law to determine the tenancy. The Subordinate Judge who tried the suit, accepted, this contention as
g correct and dismissed the plaintiffs' suit. The Subordinate Judge was of opinion that as the tenancy commenced on 1st June 1936, and continued from month to month according to the English Calendar, it could be terminated by a notice which would expire at the end of any such month. The tenant therefore could not be asked to vacate on the expiry of the 1st day of December, when another month of the tenancy would actually begin. According to the Subordinate Judge there being no document of lease, S. 110, T. P. Act, was not attracted to this case and the plaintiff was not right in excluding the 1st day in com-
h puting the period of tenancy. This decision was affirmed on appeal by the District Judge, Howrah. It is against the judgment of the District Judge that this second appeal has been preferred.

The learned Advocate-General who appears in support of the appeal has contended before us that the Court below was wrong in holding that S. 110, T. P. Act, is not applicable except where there is a formal lease in writing. In the present case, he says, there were letters exchanged between the parties which clearly stated that the lease was to commence from 1st June 1936. As this day is to be excluded for purposes of computing the period of the lease, the tenancy must be deemed to begin on

1. (1940) 1940 A. C. 613 : 109 L. J. Ch. 200 : 162 L.T. 388 : 84 S. J. 488 : 1940-2 All.E.R. 401 : 56 T. L. R. 652, *Knightsbridge Estates Trust Ltd. v. Byrne*.

a the 2nd day of each month and continue till expiry of the 1st day of the month following. In support of this contention the learned counsel has relied amongst others upon the decision of the Judicial Committee in 59 I. A. 414.² Now S. 110, T. P. Act, embodies certain technical rules of interpretation. Paragraph 1 lays down that if the time limited by a lease of immovable property is expressed as commencing from a particular day, in computing the time such day shall be excluded. In English law also when the term is expressed in the habendum to commence from a specified day, that day is not ordinarily included b in the term, while if it is stated to commence on a particular day, that day is included. But in English law these rules are not inflexible and whether the date of commencement is to be excluded or included is to be determined according to the context and subject-matter, and the deed must always be interpreted to give effect to the substantive rights of the parties: *vide* Redham's Law of Landlord and Tenant, Edn. 9, p. 31; Foa p. 113; *vide* also the cases in (1839) 9 A. & E. 879,³ (1895) 1 Q. B. 378,⁴ (1917) 1 Ch. 158.⁵ I agree with what has been said by Ameer Ali J. in 42 C.W.N. 1115⁶ that S. 110, T. P. Act, attempts c to render certain, what in England would have been a matter of some doubt, and lays down the artificial rule of construction that where a lease is said to commence from a certain date, it means from the end of that date and will have another day added on at the end.

The first point that has been raised in this appeal is whether S. 110, T. P. Act, is at all applicable when there is no lease in writing. The section does not say that there must be an instrument in writing but Mr. Gupta argues, that this must have been the intention of the Legislature. The 'time limited by a lease' says Mr. Gupta could not be "expressed" d as commencing from a particular day unless the lease is in writing. The 'naming of a date' is also possible when there is a deed, and in para. 3 of the section which speaks of the lease omitting to mention certain things, the word 'lease' could not but refer to the

instrument of lease. On the other hand, the learned Advocate-General points out that the definition of 'lease' as given in S. 105, T. P. Act, is perfectly general, and under S. 107 of the Act a document in writing and registered is necessary when the lease is for a period exceeding one year or reserves an yearly rent. In other cases a lease may be made by oral agreement accompanied by delivery of possession. It is further said that the word "expressed" does not necessarily mean 'expressed in writing' and though the question is one of interpretation of certain words in the lease, there may be evidence of actual words used by the parties when the oral agreement was concluded. The decided cases which are reported so far all relate to written leases. In 59 I. A. 414,² there was a written lease for a term of four years expressed to be from 1st June 1921. This lease expired in the year 1925, but the tenant held over as a monthly tenant which was determinable by 15 day's notice on either side under S. 106, T. P. Act. The notice to quit in this case was given by the tenants on 1st February 1928, where it was stated that they would vacate the premises on the 1st day of the succeeding month. It was held by their Lordships that the notice was a good notice. The provision of S. 110, T. P. Act, was applied to determine the period of the written lease and as it expired at the end of 1st June 1925, the monthly tenancy began on 2nd June and not on the 1st. There are two reported cases which have been decided by this Court since the pronouncement of the Judicial Committee in 59 I. A. 414,² viz., 38 C. W. N. 782⁷ and 42 C. W. N. 1115.⁶ In both of them there were written leases for a fixed period, on the expiry of which the tenant held over, and the provision of S. 110, T. P. Act, was invoked to determine the period of the written lease and not that of the tenancy constituted by holding over by the tenant. h

The point certainly is not free from doubt. Speaking for myself I would be inclined to agree with Mr. Gupta; for it seems to me improbable, that the legislature intended that a technical rule of interpretation which involves attaching particular meaning to particular words should be applied to spoken language—where the actual words used would have to be proved by extrinsic evidence. In such cases, I think, the question would be one of gathering the intention of the parties from the words used and S. 110, T. P. Act, would not in terms apply. The point however need not be finally decided in this appeal, for I concur with my

2. ('32) 19 A. I. R. 1932 P. C. 279 : 141 I. C. 514 : 60 Cal. 380 : 59 I. A. 414 (P. C.), Benoy Krishna Das v. Salsicconi.

3. (1839) 9 A. & E. 879 : 1 P. & D. 636 : 8 L. J. (N.S.) Q. B. 164 : 48 R. R. 729, Ackland v. Lutley.

4. (1895) 1 Q. B. 378 : 64 L.J.Q.B. 200 : 14 R. 135 : 72 L. T. 62 : 43 W. R. 228, Sidebotham v. Holland.

5. (1917) 1 Ch. 158 : 86 L. J. Ch. 145 : 115 L. T. 683 : 61 S. J. 115, Meggeson v. Groves.

6. ('38) 42 C.W.N. 1115, Charu Chandra v. Bankim Chandra.

7. ('34) A.I.R. 1934 Cal. 837 : 153 I. C. 673 : 38 C.W.N. 782, Sushil Chandra v. Birendrajit.

learned brother in holding that S. 110, T. P. Act, has no application to the facts of the present case, even if we assume that the section is not confined to written leases. Paragraph 1 of S. 110, T. P. Act, which is relevant for our present purposes contemplates, that a time or period should be limited by the lease and the period must be expressed to commence from a particular date. When both these conditions are fulfilled the rule of interpretation laid down in the paragraph applies and in computing the period that day is to be excluded. In the case before us there were negotiations between the parties for a three year's lease, and there was an agreement arrived at that the lease would be for a period of three years from 1st June 1936, and a formal instrument of lease for that period would be executed and registered. No document was however executed, and the tenancy was constituted by the defendant's taking possession of the godown, and paying rents which were accepted by the plaintiff. According to the case made by the plaintiff in his plaint, there was a tenancy from month to month under S. 106, T. P. Act. Thus, there was no agreement between the parties regarding the period of the lease. As there was no agreement fixing the period, the tenancy has been taken to be from month to month under S. 106, T. P. Act, which applies only where there is no agreement to the contrary. As no time was fixed by the lease itself there could be no question of expressing it to begin from a particular date, and S. 110, T. P. Act, has in these circumstances got no application whatsoever. The letters exchanged by the parties do indeed speak of the tenancy commencing from 1st June 1936, but they do not constitute the basis of the present lease. That agreement was not given effect to by the parties and the transaction was ultimately concluded on a different basis altogether. This being the position we cannot determine the time of the commencement of the tenancy by simply applying the rule of interpretation contained in S. 110, T. P. Act, to the words actually used in these letters. As S. 110, T. P. Act, does not apply, the date of the commencement of the tenancy has got to be ascertained like any other fact from such materials as have been placed by the parties before the Court. Here we have these facts, viz., that the tenant went into possession on 1st June 1936, and the rents have since then been all along paid according to the months of the English Calendar. There is nothing in the evidence to show that the 1st day of June was intended to be excluded from the month of tenancy. In these circumstances, I agree with my learned

brother in holding that the decision of the Court below is right and this appeal must fail.
G.N. *Appeal dismissed.*

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HENDERSON J.

Ram Ranjan Das—Judgment-debtor — Appellant

v.

Maharaj Bahadur Sinha—Respondent.

Appeal No. 268 of 1941, Decided on 9th December 1943, from appellate order of Dist. Judge, Birbhum, D/- 15th August 1941.

(a) Bengal Agricultural Debtors Act (7 of 1936, as amended by Act 8 of 1940), Ss. 20 and 34 — Whether liability is debt — Board alone can decide — Notice under S. 34 — Effect of.

Under S. 20 the question whether the liability is a debt or not is a matter which has to be decided by the board and it is no longer open to the Courts to ignore a notice under S. 34 on the ground that there is no debt within the meaning of the Act. [P 89c,d]

(b) Bengal Agricultural Debtors Act (7 of 1936, as amended by Act 8 of 1940), Ss. 20 and 34 — S. 20 is retrospective—Application under S. 174, Ben. Ten. Act, pending when amending Act came into force — S. 20 applies.

Section 20 as amended is retrospective and applies to pending proceedings. Where in execution proceedings the application under S. 174, Ben. Ten. Act, was undisposed of when the amending Act, came into force it cannot be said that the sale had become absolute within the Explanation to S. 34 and therefore the execution proceedings must be deemed to be pending. Section 20 consequently applies to the execution proceedings and it is not open to the civil Court to ignore the notice under S. 34 on the ground that there was no debt within the meaning of the Act because that question under S. 20 can be decided by the board alone: ('43) 30 A.I.R. 1943 Cal. 573, *Rel. on*; ('41) 28 A. I. R. 1941 Cal. 639, *Dissent*. [P 89d,f]

Sailendra Nath Bannerjee — for Appellant.

Urukramdas Chakrabarty — for Respondent.

Judgment. — This appeal is by the judgment-debtor and is directed against an order refusing to stay proceedings for delivery of possession in a certain execution proceeding in accordance with a notice served upon the Court under the provisions of S. 34, Bengal Agricultural Debtors Act. The sale took place on 22nd September 1937, and was confirmed on 8th November 1937. The appellant's father, who was the original judgment-debtor, then filed the usual application under S. 174, Ben. Ten. Act. The ensuing miscellaneous case was compromised on terms—the terms being such as are frequently found in cases of this kind. The judgment-debtor agreed to pay Rs. 47-10-5 pies at once and the balance in eight quarterly instalments. If the instalments were duly paid, the application under S. 174 would be allowed and the sale set aside. In the case of default, the application would be dismissed.

a The first five instalments were duly paid and then there was a default. After the default, the judgment-debtor went to a Debt Settlement Board on 3rd September 1939. I am informed that the case was subsequently transferred to the Special Debt Settlement Board of the Sub-Division. In the meantime, the decree-holder applied for delivery of possession on 24th May 1940. The notice under S. 34, Bengal Agricultural Debtors Act, was received on 2nd August 1940. I am told by the learned advocates that the case is still pending before the board. If this is so, it is alarming to find that the board has taken over three b years to do nothing and the attention of the Collector of the District should be drawn to this case.

Apart from a plea of payment, subsequent to the filing of the application before the board, the dispute between the parties is whether it can be said that the money due under the compromise agreement is a debt. On the one hand, it is contended that it cannot be a debt, inasmuch as the appellant cannot be compelled to pay it. This was the view taken by myself in 44 C. W. N. 789.¹ On the other hand, it has been held that in the case of a usufructuary mortgage, although c the mortgagor cannot be compelled to pay, the mortgage-money is a debt, because the mortgagor cannot recover possession of his land without paying it. So, in the present case, it is contended that in view of the agreement made between the parties, the present case is similar to that of a usufructuary mortgage. Thus, there can be no doubt that it has to be decided between the parties whether there is a debt or not, and arguments can be put forward in support of either view. Under S. 20, Bengal Agricultural Debtors Act, as amended, the question whether the liability is a debt or not is a matter which has to be decided by d the board. The decisions upon which the Courts below relied were all made under the old section and I suppose that it was in order to get rid of the effect of those decisions that the section was thus amended. As a result of that amendment, questions such as this have to be decided by the board, and it is no longer open to the Courts to ignore a notice under S. 34 on the ground that there is no debt within the meaning of the Act.

The amending Act came into force on 11th July 1940. At that time both the proceedings before the board and the respondent's application in the executing Court were pending. It is therefore to be considered whether the

1. ('40) 44 C. W. N. 789, Krishna Gobinda v. Salamatulla.

amended section applies or not. This aspect e of the case was not considered by either of the Courts below. Now there is an obiter dictum by Mukherjea J. in 45 C. W. N. 519² which is in favour of the respondents; with very great respect to that learned Judge I should find it difficult to accept that decision as correct. It is well settled that no person has a vested right in any particular course of proceedings. It is however unnecessary for me to consider this matter any further, because Mr. Bannerjee has drawn my attention to the fact that there is a decision in his favour by a Division Bench of this Court in 46 C. W. N. 1020.³ In opposing the appeal, Mr. Chakrabarty relied f upon the explanation to S. 34 itself. That explanation is to the effect that an execution proceeding for the sale of any property shall be deemed to be pending and the debt in respect of which the sale takes place shall be deemed to exist until such sale becomes absolute. There was an application under S. 174, Ben. Ten. Act, and as long as that application is undisposed of, it cannot be said that the sale has become absolute. By the agreement between the parties if certain payments were made then the sale will be set aside. The question now in dispute between the parties is whether the appellant's right to have the sale g set aside has lapsed. Until that matter has been decided, it cannot be said that the sale has become absolute. The appeal is accordingly allowed and I direct that the application of the respondents for delivery of possession be kept pending in accordance with the notice received under S. 34, Bengal Agricultural Debtors Act. I make no order as to costs.

G.N.

Appeal allowed.

2. ('41) 28 A. I. R. 1941 Cal. 639 : 197 I. C. 606 : 73 C. L. J. 234 : 45 C. W. N. 519, Javed Sheikh v. Taher Mallick.

3. ('43) 30 A. I. R. 1943 Cal. 573 : 209 I. C. 412 : I. L. R. (1943) 1 Cal. 134 : 46 C. W. N. 1020, Bireswar Moral v. Indu Bhusan. h

* A. I. R. (31) 1944 Calcutta 89

NASIM ALI AND PAL JJ.

Jabbor Mahi alias Jabborullah —

Defendant 3 — Appellant

v.

Ramani Mohan Chowdhury and others

— Plaintiffs — Respondents.

Letters Patent Appeal No. 6 of 1942, Decided on 18th March 1943, from judgment of Biswas J., in Appellate Decree No. 1333 of 1939, D/- 25th February 1942.

* (a) Registration Act (1908), S. 17 (1) (b) and (d) and S. 17 (2) (vi) — Lease satisfying both cls. (b) and (d) — Benefit of cl. (vi) of sub-s. (2) is attracted (Per Biswas J.).

a Where a lease requires registration solely under cl. (d) because it may not be brought within the terms of cl. (b), it will not attract the benefit of cl. (vi) of sub-s. (2). But cl. (b) is in such wide terms that leases would also easily come within its scope. And where a lease may be regarded as an instrument under cl. (b) as well as one under cl. (d), the exception in cl. (vi) of sub-s. (2) would apply : *Case law discussed.* [P 92a]

(b) Registration Act (1908), S. 17 (1) (b), (d) and (2) (vi) — Compromise decree creating lease for term exceeding one year—Cl. (d) and not cl. (b) applies—Cl. (2) (vi) does not apply. (Per *Nasim Ali and Pal JJ.*)

b A compromise decree in a rent suit by which a lease is created for a term exceeding one year at an annual rent is compulsorily registrable under S. 17 (1) (d). It is not protected from registration under S. 17 (2) (vi). It does not come under clause (b) as cl. (b) refers to certain non-testamentary instruments while cl. (d) specifically refers to leases: *View of Biswas J., reversed.* [P 92d]

Chandra Sekhar Sen and Nikunja Behari Roy
— for Appellant.

Hemendra Kumar Das — for Respondents.

Tapadhir Krishna Roy Dastidar for Upendra Kumar Roy — for Deputy Registrar.

c *Biswas J.* — This is an appeal by defendant 3 who alone contested the suit in the Courts below. The suit was for arrears of rent, and a two-fold defence was taken: first, a denial of the relationship of landlord and tenant, and secondly, that the rate of rent was not as the plaintiffs had claimed. Both the pleas were negatived, and a decree was passed at the rate claimed, which was Re. 1 per keor per year. The only question raised in this appeal is as to the rate of rent. It appears that the tenancy was originally created by a kabuliyat for a term of one year in which the rent stipulated was at the rate of 8 annas per keor. The defendants held over on the expiry of the term, and the plaintiffs thereafter sued them for rent. This suit was disposed of in terms of a compromise. By the **a** solenama the rent was fixed at Re. 1 per keor, and it was further provided that there was to be no enhancement for 15 years. It is on this solenama which was made a part of the decree that the plaintiffs base their claim in the present suit. The solenama was not registered, and so defendant 3 contended it was not admissible in evidence. His case was that it was either a new lease for a term exceeding one year, or a document varying the rent payable under the previous lease which was a registered instrument, and in either view, it was said, the document required registration.

The learned Additional District Judge seemed to think that the solenama was not a new lease, but a variation of the old lease. On this footing, he was of opinion that as the

old lease was a registered document, the case might be held to come within the Full Bench ruling in 39 Cal. 284,¹ which laid down that a document embodying an agreement for variation of rent under a pre-existing lease, registered, as required by S. 17, sub-s. (1), cl. (d), Registration Act, also required registration. The Full Bench approved the earlier judgment of this Court in 37 Cal. 293,² which was subsequently affirmed on appeal on this point by the Judicial Committee in 40 I. A. 223³ at p. 230. The learned Judge however did not give effect to this view, and sought, on the other hand, to avoid the effect of the Full Bench decision by treating the solenama as a **f** document under cl. (b) of sub-s. (1), that is to say, as a document creating or limiting an interest in immovable property of the value of upwards of Rs. 100, and thus bringing it within the exception enacted in cl. (vi) of sub-s. (2), which exempts such a document from compulsory registration, if incorporated in a decree or order of a Court.

I am not sure that the Full Bench decision would at all apply to this case. The Full Bench judgment as well as that in the earlier case which it approves proceeds on the footing that the previous lease must not only be **a** registered in point of fact, but be also compulsorily registrable under S. 17, Registration Act. That is not the case here. The old lease had no doubt been registered, but as it was only for a term of one year and did not reserve a yearly rent, it could not be said that the document required registration. This explains why Mr. Sen appearing on behalf of the appellant did not press this aspect of the matter before me. Mr. Sen's contention was that the solenama was a lease under cl. (d) of sub-s. (1) of S. 17, and that therefore it could not come within the exception in cl. (vi) of sub-s. (2). It was pointed out, and rightly so, **h** that sub-s. (2) by its opening words was expressly limited to documents falling within the categories mentioned in cls. (b) and (c), and not any other clause of sub-s. (1), and in support of this construction, he referred to a number of cases, such as 31 C. W. N. 1099,⁴ 56

1. ('11) 39 Cal. 284 : 12 I. C. 723 : 16 C. W. N. 55 : 14 C. L. J. 411 (F.B.), *Lalit Mohan Ghosh v. Gopali Chauck Coal Co., Ltd.*

2. ('10) 37 Cal. 293 : 10 C. L. J. 570, *Durga Prasad Singh v. Rajendra Narain Bagchi.*

3. ('13) 41 Cal. 493 : 21 I. C. 750 : 40 I. A. 223 : 18 C. W. N. 66 (P.C.), *Durga Prasad v. Rajendra Narayan.*

4. (27) 14 A. I. R. 1927 Cal. 913 : 104 I. C. 812 : 31 C. W. N. 1099, *Rajani Kanta v. Raj Kumari Dassi.*

a Cal. 427⁵ and 45 C. W. N. 129.⁶ Mr. Das on behalf of the respondents did not contest the proposition that if the solenama was a lease under cl. (d) of sub-s. (1), it could not attract the operation of cl. (vi) of sub-s. (2), so as to be exempt from registration on the ground that it was embodied in a decree, but relying on 59 C.L.J. 328,⁷ he stoutly maintained that it was merely a recognition of a pre-existing tenancy, and did not amount to a lease at all. It was in every sense a document of the class referred to in cl. (b) of sub-s. (1), a non-testamentary instrument purporting to create or limit an interest in immovable property, and b as such, it clearly came within the exception contained in cl. (vi) of sub-section (2).

I think that on the facts it may easily be taken for granted that if the solenama is a document of the kind mentioned in cl. (b), it satisfies the condition therein laid down as to the value of the interest created thereby, and similarly, that if it is a lease, it is one fulfilling the requirement of cl. (d) as regards the term and the rent reserved. This being the position, an important question arises which does not seem to have been fully appreciated in the arguments advanced on either side. As the case was presented on behalf of the respective parties, it was made to appear as if it lay between two alternatives, either that the solenama was a document under cl. (b), or that it was a lease under cl. (d), and that by virtue of the provision in cl. (vi) of sub-s. (2), it would be exempt from registration in one case, but not in the other. The possibility that the document might be regarded as equally coming under either clause was wholly ignored, and yet it seems to me that this is a viewpoint which should have a material bearing on the question as to whether the exemption under sub-s. (2) would apply. So far as sub-s. (1) is concerned, it would of course make no difference under which category the document d might be deemed to fall.

Sub-section (1) of S. 17 contains several cls. (a) to (e), each specifying a distinct category of documents which are made compulsorily registrable under its provisions. Of these, cl. (a) refers to instruments of gift of immovable property, and cl. (d) to leases of such property of a certain description, while cl. (b) deals generally with non-testamentary

instruments purporting to affect immovable e property. In the case of gifts, it is recognised that they are documents of the kind mentioned in cl. (b), as this clause expressly speaks of "other non-testamentary instruments." In the case of leases, there is no such express indication but cl. (b) is in such wide terms that in my opinion leases would also easily come within its scope. Clause (b) no doubt sets a limit as to the value of the interest dealt with by the instrument referred to therein, and a gift or a lease, if it is to come under this clause, must necessarily therefore satisfy this limit.

The question arises in these circumstances f whether for the purposes of sub-s. (2) of S. 17, the solenama here, constituting as it does a lease under cl. (d) of sub-s. (1), may not yet be brought under cl. (b), seeing that both as regards nature and value it also answers the description of a document specified in the last mentioned clause. It may doubtless be argued that as gifts and leases have been specifically mentioned in distinct clauses, they are not to be classed as other non-testamentary instruments which form another distinct head, and in no circumstances therefore can they attract the operation of sub-s. (2), which in terms enacts an exception to cls. (b) and (c) only, g and not to cl. (a) or cl. (d). On the other hand, it may well be maintained that the object of separate classification of gifts and leases under cls. (a) and (d) is not to exclude them from the scope of cl. (b) wholly, but only to bring under the provisions of sub-s. (1) a larger number of such documents than would be admissible by virtue of clause (b) alone. Clause (b) requires that in order that a document affecting an interest in immovable property as stated therein may be compulsorily registrable, such interest must be of the value of Rs. 100 or upwards, and it is certainly arguable that only because in the case of gifts and h leases this requirement is dispensed with, has the Legislature found it necessary to make separate provision for these categories of documents. In the case of leases, a different criterion is in fact laid down to make such a document compulsorily registrable, having reference only to the duration of the term and the rent reserved, and irrespective of the value of the interest in the property created by the demise. To some extent, therefore, on this view, cl. (a) or cl. (d) is bound to overlap cl. (b), and in cases where there is such overlapping, there seems to be no reason why it should not be possible to treat the document as coming equally under clause (b) and under cl. (a) or cl. (d), as the case may be.

5. ('29) 16 A.I.R. 1929 Cal. 462 : 118 I. C. 895 : 56 Cal. 427, *Nazar Ali v. Indra Kumar*.

6. ('41) 28 A.I.R. 1941 Cal. 102 : 193 I. C. 635 : 45 C. W. N. 129 : 72 C. L. J. 132, *Atul Krishna v. Zahed Mondal*.

7. ('34) 21 A.I.R. 1934 Cal. 799 : 153 I. C. 313 : 59 C.L.J. 328, *Jogesh Chandra v. Behari Lal Mitra*.

a In none of the cases to which my attention has been drawn, does the matter appear to have been considered from this point of view, and yet this seems to me to be a point of substance. As at present advised, confining myself to the case of a lease, the view I am inclined to take is that where a lease requires registration solely under cl. (d), because it may not be brought within the terms of cl. (b), it will not attract the benefit of cl. (vi) of sub-s. (2). Where however a lease may be regarded as an instrument under cl. (b) as well as one under cl. (d), I do not see why the exception should not apply. In the present case, *b* therefore, as it may be assumed that the interest created by the solenama was of the required value, it should be possible to bring the document within the provisions of sub-s. (2). As the solenama was embodied in a decree of a Court, it must follow that it was exempted from registration under cl. (vi) of that sub-section, and the plaintiffs will accordingly be entitled to rely on it in support of their claim. The result is that the appeal fails, and is dismissed with costs. Leave to appeal under Cl. 15, Letters Patent, is granted.

[The Letters Patent appeal was heard by Nasim Ali and Pal JJ. and the following *c* judgment was delivered:]

Judgment. — This appeal arises out of a suit to recover arrears of rent. The dispute between the parties is about the rate of rent annually payable. The plaintiffs' case is that the rent payable is Re. 1 per kear while the case of the defendants is that the rent payable is eight annas per kear. The learned Judge has accepted the plaintiffs' case. The plaintiffs' case entirely depends upon a compromise decree in a previous rent suit. By this compromise decree a lease was created in favour of the defendant for 15 years at an annual rent of Re. 1 per kear. The compromise petition or decree was not registered *d* though it was compulsorily registerable under S. 17 (d), Registration Act. It is not protected from registration under S. 17 (2) (vi). Mr. Das appearing on behalf of the respondents, however, contended that this compromise may come under S. 17 (b) and consequently, S. 17 (2) (vi) would be attracted to this case. We are unable to accept this contention. Clause (b) refers to certain non-testamentary instruments while cl. (d) specifically refers to leases. The plaintiffs want to rely upon this as a lease in the present case. Consequently, the compromise is hit by S. 17 (d), Registration Act. The result therefore is that this appeal is allowed. The plaintiffs' suit is decreed at the rate of eight annas per kear for the period

in suit with usual damages. There will be no order for costs in this Court.

Final order. — On hearing the matter further, we are of opinion that there should be no order for costs in the second appeal and in the Letters Patent Appeal, and also that the orders for costs of the Courts below, namely, the Court of first instance and the first appellate Court should stand. We order accordingly.

K.S./R.K.

Appeal allowed.

A. I. R. (31) 1944 Calcutta 92

DERBYSHIRE C. J. AND LODGE J.

Sailendra Nath Mitter and another
Appellants

v.

Emperor.

Criminal Appeals Nos. 561 and 562 of 1941, Decided on 1st September 1942.

(a) Penal Code (1860), Ss. 405 and 24 — Manager of bank taking security for overdraft from customer and causing security to be entered in books of bank — Manager shortly returning security to customer before overdraft satisfied—Fact of return not mentioned in books of bank — Both manager and customer held *g* acted dishonestly within S. 24 — Manager held guilty of criminal breach of trust — Customer held guilty of abetment.

A was a servant of the bank—a manager—appointed by the bank under a power of attorney executed by the bank which empowered *A* to manage its business and do certain things on its behalf. The bank only promised to ratify what *A* should lawfully do or cause to be done under the power of attorney. *B* was approved as a customer of the bank by *A* and was allowed to open an overdraft account with the bank on a contract of pledge executed by *B* which contemplated an overdraft of a certain amount against Government Securities with a margin of ten per cent. Under the contract of pledge *B* deposited under the lodgment memos which were signed by *A* certain *G. P. Notes* as security for his overdrafts. Those *h* Government Pronotes were caused to be entered in account books of the bank by *A* but were shortly after handed over by *A* to *B* before the amount of overdraft was satisfied pro tanto or completely to enable *B* to have the benefit of the same in some way or the other (by pledging the same with other banks). *A* did not cause any entries to be made in the books of the bank to show that the Government Pronotes had been handed back to *B* and thus showed a false statement of affairs and deprived the bank of its security against the amount overdrawn by *B* :

Held that it was the duty of *A* on behalf of the bank to retain the *G. P. Notes* under the contract of pledge until such time as a corresponding amount of debt was paid off or that they were sold by the bank to satisfy the overdrafts. In clear breach of his duty to the bank *A* handed the deposited securities back to *B* who had no right to those securities as he had given them in pledge under the contract of pledge, and he had deposited them under lodgment memos

^a which apart from the contract of pledge would give the bank a banker's lien upon them for the overdrafts; until the overdrafts were satisfied either pro tanto or completely, *B* was not entitled to the return of the securities in corresponding part or as a whole. *A* as a bank manager knew that he was returning the securities to *B* to enable *B* to have the benefit of them in some way or other and in so handing them back was acting not only in breach of his duty to his employers to act faithfully for and on behalf of his employers, but was acting in breach of the agreement of pledge entered into by himself on behalf of the bank and *B* with regard to those securities and was wrongfully depriving the bank — his employers — of their property in those securities, thus causing them wrongful loss. At the same time he was giving those securities with all their benefits to *B*, who was not entitled to them, and so caused *B* wrongful gain. The handing back of the securities by *A* to *B* was done dishonestly within the meaning of S. 24, since they caused wrongful loss to the bank and wrongful gain to *B* and as *B* as a businessman knew that he was achieving wrongful gain and that the bank was suffering wrongful loss he was acting dishonestly under S. 24. [P 103e,f,g; P 104a]

(2) the handing over of the G. P. Notes by *A* to *B* constituted criminal breach of trust under S. 405. By virtue of his position as manager and agent under the power of attorney, *A* was in possession of the securities deposited by *B* for and on behalf of the bank to hold them and to deal with them in accordance with the terms of the contract of pledge made between the bank and *B*. *A* had by the joint operation of the power of attorney, the contract of pledge and the lodgment of the securities been entrusted with the securities and with dominion over them to hold them as security for the overdrafts. In dishonestly disposing of that property in violation of the contract arising from the pledge and lodgment of the securities by returning them to *B* knowing full well that each return involved a wrongful gain to *B* and a wrongful loss to the bank, his employers, *A* committed criminal breach of trust within the meaning of S. 405 on each occasion when he handed over the G. P. Notes to *B*. [P 105e]

(3) The fact that *A* himself was not proved to have made a wrongful gain was immaterial for purposes of the offence under S. 405. [P 105e]

(4) *B* was guilty of abetting the criminal breaches of trust committed by *A*. [P 105f]

^d (5) The power of attorney could not protect *A* as he had broken the provisions of the Criminal law because the bank in the power of attorney had only promised to ratify what *A* should lawfully do or cause to be done under it. [P 103b]

Penal Code —

('40) Ratanlal, Page 1005, Note "Dishonestly person so to do;" Page 1006, Note "Wilfully so to do;" Page 57.

('36) Gour, Page 1363, N. 4778; Page 1358, N. 4763; Page 166, N. 203.

(b) Criminal P. C. (1908), S. 423 (1) (b), (2) — Appellate Court can alter conviction from one under wrong section to one under proper section.

Under S. 423 (1) (b), (2) the appellate Court can on the same facts alter the conviction from one under a wrong section to one under the proper section. [P 106a]

Cr. P. C. —

('41) Chitaley, S. 423, N. 31, Pt. 8.

('41) Mitra, Page 1347, N. 1145.

Carden Noad, D. N. Bhattacharyya, B. C. Ghose, Anil Chandra Roy Chowdhuri, G. Gupta Bhaya, S. P. Chaudhuri, S. M. Morshed and B. K. Ghose; and N. C. Sen, S. C. Talukdar, S. R. Das and P. Bhattacharjee — for Appellants (Sailendra Nath Mitter and Mathuradas Purushottamdas Amin, respectively).

A. K. Basu, Bhabesh Narain Basu and Bireswar Chatterjee — for the Crown.

Judgment. — These appeals are brought by Sailendra Nath Mitter and Mathuradas Purshottamdas Amin against their convictions by the Chief Presidency Magistrate of Calcutta of offences —

"(a) Conspiracy to commit theft under S. 120/381, Penal Code; (b) Against Amin of theft under S. 381, Penal Code, on or about 26th May 1939, and against Mitter for abetment of the said theft under S. 109/381, Penal Code; (c) Against Amin of theft under S. 381, Penal Code, on or about 26th May 1939, and against Mitter of abetment of theft under S. 109/381, Penal Code; (d) Against Amin of theft under S. 381 on or about 30th May 1939, and against Mitter of abetment of the said theft under S. 109/381, Penal Code; (e) Against Amin of theft under S. 381 on or about 31st May 1939, and against Mitter of abetment of the said theft under S. 109/381, Penal Code; (f) Against Amin of theft under S. 381, Penal Code, on 31st May 1939, and against Mitter of abetment of the said theft on the said date under S. 109/381, Penal Code; (g) Against Amin of theft under S. 381 on or about 31st May 1939, and against Mitter of abetment of the said theft under S. 109/381, Penal Code; (h) Against Amin of theft under S. 381, Penal Code, on or about 1st June 1939, and against Mitter of abetment of the said theft under S. 109/381, Penal Code; (i) Against Amin of theft under S. 381, Penal Code, on or about 2nd June 1939, and against Mitter of abetment of the said theft under S. 109/381, Penal Code; (j) Against Amin of theft under S. 381, Penal Code, on or about 2nd June 1939, and against Mitter of abetment of the said theft under S. 109/381, Penal Code."

The Magistrate had preferred further charges but acquitted the two accused of the same, namely, (1) criminal breach of trust under S. 408, Penal Code, in respect of a sum of money of Rs. 67,804-2-0, on or about 22nd May 1939, against Amin and a corresponding charge against Mitter of abetment of the alleged criminal breach of trust and (2) criminal breach of trust against Amin on or about 13th June 1939, in respect of a sum of Rs. 1,22,935-12-0 and a corresponding charge of abetment against Mitter in respect of the alleged breach of trust. Amin was at all material times the agent or branch manager of the Bank of Baroda, Ltd., at Calcutta. The Bank of Baroda, Ltd., is registered as a company in the State of Baroda where its head office is : the chief office, however, is at Bombay. The Calcutta branch was established somewhere about 1937. Amin held this appointment with a power of attorney from the bank to which reference will be made later.

The appellant Mitter is a member of a well-known Calcutta family and had at certain

a times considerable means. Mitter carried on business with his brother as a stock-broker in Calcutta. His brother died shortly after the happenings of the matters complained of. The brother seems to have played no part in them. In addition to his stock-broking business, Mitter was interested in various business concerns, e. g., the sale of motorcars, manufacture of bicycles and, in particular, a certain cotton mill known as the Basanti Cotton Mills in which his family had a predominant holding of the shares. Further Mitters, Ltd., of which Mitter was a member was the managing agent of the Basanti Cotton Mills. Mitter had personal accounts with many banks, e. g., the Central Bank of India, the Punjab National Bank, Ltd., the Netherlands Trading Society as well as the Bank of Baroda, Ltd. In addition Mitter used and operated upon the account of one D. C. Ghose, a brother-in-law of his, which the latter had with the Bank of Baroda at Calcutta. Mitter at all material times had guaranteed Ghose's account up to an extent of two lacs of rupees. Further Mitter appears to have been associated closely in business with one S. C. Bose who was also a stock-broker. In the charges originally before the Magistrate both D. C. Ghose and S. C. Bose were accused along with Mitter and Amin but Ghose and Bose were discharged and neither was called to give evidence by either side.

The Bank of Baroda was in 1939 relatively a new comer to Calcutta and naturally anxious to get business and Mitter was, through his various activities mentioned, a busy man with corresponding operations on his bank account. On 23rd April 1938, Mitter applied for banking facilities with the Bank of Baroda at Calcutta. His application was approved up to a limit of Rs. 25,000 over-draft with securities offered. In Ex. 198 wherein Amin, as bank manager approved of the application, it is stated under the head "delivery order" "Government securities." A margin of 30 per cent. was stipulated for and the rate of interest was 1 per cent. above the bank rate with a minimum of 4½ per cent. On the same day, 23rd April 1938, Mitter signed a letter of pledge addressed to the Bank of Baroda, Calcutta. It was the usual printed letter of pledge taken by banks, the relevant parts of which are as follows :

"I agree that . . . securities for property of whatever description, other than immovable property, which I may from time to time place with the Bank of Baroda Ltd., and all property, moneys and advantages comprised in, covered or represented by and derivable under or by virtue of such documents or securities, are hereby pledged and charged to the intent that the same shall be a security for the pay-

ment to the bank on demand in Calcutta of all moneys which now are, or which at any time or times hereafter may become due from me to the bank, whether alone or in co-partnership with any person."

The document goes on—

"And I agree to repay to the bank on demand in Calcutta all such moneys as and when required by the bank. And I agree and declare that the bank may at any time or times after default by me in such payment and without and notice to me sell the said property, moneys and advantages and securities and out of the proceeds of sale of the said securities or the said goods as the case may be retain all moneys owing by me in my said account current with the bank. And I agree to execute on demand by the bank such further documents as may be required by the bank to vest all such goods, documents of title to goods and securities in the bank and to render the same readily saleable or transferable by the bank at any time."

An account was duly opened as and from that date and Mitter was at times in credit and at times overdrawn. Up to the end of March 1939, with the exception of one or two short periods or parts of a day the account was not seriously overdrawn. As from 1st April 1939, the account became very seriously overdrawn. On 1st April 1939, the debit was Rs. 1,26,480; on 5th April 1939, it was in debit Rs. 1,17,722; on 13th April 1939, it was in credit Rs. 1868; on 1st May 1939, it was in debit Rs. 1,08,292; on 12 May, it was Rs. 67,954 in debit; on 13th May it was Rs. 1,23,927 in debit; on 29th May it was Rs. 1,82,444 in debit; on 30th May it was in debit Rs. 2,45,895; on 31st May it was Rs. 3,34,135 in debit; on 1st June 1939, it was Rs. 3,91,138; on 2nd June it was Rupees 4,98,379 in debit; on 6th June it was Rupees 5,05,478 in debit; on 9th June it was in debit Rs. 5,14,155, on 9th June it became reduced, according to the bank's books to Rs. 2,54,155. The subsequent history of the account will be dealt with later.

A document has been put in dated 2nd June (Ex. 202) signed by Amin in which Mitter was said to be the applicant for an overdraft of Rs. 5,60,000 against Government securities with a margin of 10 per cent. and a rate of interest at ½ per cent. above the Reserve Bank rate with a minimum of 3½ per cent. On the same day, 2nd June 1939, Mitter signed a form of pledge similar to that signed on 23rd April 1938.

It is clear that at about the beginning of April 1939, Mitter contemplated borrowing heavily from the bank, as in fact he did. On 6th April 1939, Amin signed and forwarded to the Head Office a report on the financial standing of the two Mitter brothers (Ex. 294). In that report he stated that their credit was respectable, that they were borrowing from the market, that they were overtrading and

doing speculative business, that they had properties of various kinds, that their net worth was Rs. 3 to 5 lacs, that they inherited individually along with three other brothers about Rs. 8 lacs in cash, investments and landed properties, that only a small portion of their capital was invested in their business, and that they finance their business mostly by borrowing. Then there are these words:

"They are considered respectable, and although reported short of ready cash enjoy fair credit in the market. Considered good for ordinary but secured business engagements. Means reported to be fairly good to good including landed property."

Mention has been made previously of Mitter's interest in a bicycle manufacturing concern. The company was formed to manufacture bicycles in India at Patna. Mitter was one of the promoters and under an agreement (Ex. 307) known in this case as the Darbhanga Agreement, Mitter was to receive Rs. 72,000 and at the same time leave in the concern in the form of shares Rs. 50,000. The balance of the money Rs. 22,000 was to be paid to Mitter under the agreement and Mitter was relieved of all responsibility for payment for certain machinery ordered from Europe and the Maharajadhiraj of Darbhanga guaranteed payment of this amount. There is no evidence that any of the benefits of this agreement or the money which Mitter received under it or the shares which he was due to take up under it were ever received by the bank. It has been cited in the case as evidence that Mitter was a man of means and credit. Shortly after the matters complained of which will be dealt with later Amin absented himself from his office at the bank and ultimately the drawers in that office were opened in the presence of a Notary Public. In one of the drawers was found a letter dated 1st April 1939, by Mitter to Amin in which Mitter stated:

"... I am enclosing herewith a list of my assets. Apart from my family connexion and the bank reference about which I mentioned to you the fact that we possess practically the two-third share of the Basanti Cotton Mills Ltd., of which we are the Managing Agents will I hope satisfy you to enable me to have temporary accommodation from time to time to the extent of Rs. 6 lacs in the shape of cheques which you will please mark 'good for payment' drawn by myself or by myself in the joint account. Further as desired by you in consideration of your marking cheque 'good for payment' for all or any of the above-named drawers in order to enable me to raise the money I am enclosing herewith a promissory note for the above sum of Rs. 6 lacs as additional security for your bank."

On the back of the letter there is a note—"On enquiries bank reports satisfactory, arrangements to be proposed to Local Com-

mittee." A list of properties was given comprising nine buildings in Calcutta of a total value of Rs. 22,55,000 together with 20,000 preference shares and 50,000 ordinary shares in the Basanti Cotton Mills. That list of properties was signed by the two Mitter brothers. The deeds of mortgage and a conveyance relating to those properties have been produced in Court and it appears that on 1st April 1939, the immovable properties referred to were mortgaged to the Roys of Hatkhola for a sum of Rs. 9,25,000 and that on 26th April 1939, the same properties were sold as from 1st April 1939, to the Roys of Hatkhola for Rs. 12,15,000. It would appear therefore that the value of the properties apart from the shares of the two Mitters was about Rs. 3 to 4 lacs. The prosecution have thrown doubt upon the letter of 1st April 1939 alleging that it was written by Mitter to Amin at the latter's request when Mitter, as the figures quoted before show, had induced Amin to give him an overdraft of several lacs. Whatever the value of the Darbhanga agreement, the immovable properties of the Mitters and the shares in the Basanti Cotton Mills, none of them was ever pledged with the bank in respect of the overdrafts. P. W. 57 S. C. Gupta, in his evidence stated that he prepared and sent to the head office of the bank every month a statement of all overdraft accounts and also that he sent every week to the head office a statement of all irregular accounts: by irregular accounts he apparently meant those where the overdrafts exceeded the value of the securities deposited against them.

On 20th April 1939, Mr. Sonalkar, the General Manager at Baroda drew Amin's attention by a letter (Ex. B/B/B/B) to Mitter's overdraft to the extent of Rs. 87,447 and to the fact that this overdraft had been allowed against Nath Bank's pay order for Rs. 70,000 and stated:

"We must say that looking to the standing of Nath Bank you took too great a risk in allowing the customer to draw against their pay slip such a large amount as Rs. 70,000 and await your explanation for granting a facility so far in excess of your powers."

Amin replied to this by the one of 27th April (Ex. C/C/C/C) to which the General Manager of the bank at Baroda replied by another letter dated 12th May 1939 (Exhibit D/D/D/D) as follows:

"We have received your letter of the 27th ultimo and are not entirely satisfied with the explanation given therein. You have evidently been in the habit of granting exceptional facilities to some of your clients and whilst we appreciate the necessity of your obliging your clients in exceptional circumstances where you are sure the bank is running no

a risk, we emphasise the necessity of your exercising more caution lest the bank should suffer."

In reply to that letter Amin on 15th May 1939, wrote as follows to Mathew D'Souza who acted at Baroda in the absence of Mr. Groundwater, the General Manager (Ex. O/O):

"Discretion exercised by me does not meet with the approval of head office, nor am I definitely told to discontinue such practices. I am completely at a loss to know what exactly is wanted of me. Only clients of standing and repute are allowed certain facilities. This also is done in varying degrees. But whatever is done by me is to be treated as exceptional. The only course left open is to refuse so-called facilities to those who are having them now, and if thereby the business is lost I am to prefer that."

b It is clear, therefore, that by the middle of May when Mitter's overdraft was over a lac of rupees the bank warned Amin to be careful and not to allow exceptional facilities to Mitter. It will be convenient here to deal with the system of recording lodgment of securities pledged against overdrafts. There was in the bank a department specially set up to deal with the recording and custody of securities deposited against overdrafts. In May and June of 1939, there were two joint custodians of securities. Mr. Trilokekar was the officer-in-charge of the securities department and the senior of the two joint custodians, and Mr. Gobindyo was the other custodian. They have a special place in the bank and they sit at tables close to each other. There is a safe close by for keeping securities which are in their joint custody. There is a strong room adjoining the securities department. When shares and securities are received from customers, they are held in the joint custody of the two custodians and kept in the safe in the securities department. When a customer lodges securities in respect of his overdraft he fills in in duplicate the particulars of the securities he is depositing on the lodgment memo. He takes the latter to the second custodian who signs the counterfoil and puts a rubber stamp with date, etc., on the counterfoil which is called the lodgment memo. Then the custodian tears off the memo portion and retains it and gives back the book to the customer so that both the customer and the bank has a list of the shares that are deposited. The custodian then enters the particulars of the deposited securities in the Security Inward Register giving them a serial number which he writes on the memo retained by him. The custodian then sends the register, the memo and the securities themselves to the security clerk to fill up the other books. The clerk then makes entries in the lodgment register (overdrafts). The en-

tries from the lodgment register are posted in the security register the next day. There is prepared for each customer who has an overdraft account what is called a valuation sheet which shows the customer's deposited securities, the market price of each kind of share, and what is called the "advance value" of the securities. The advance value is determined by the prevailing market rates less the marginal percentage. The valuation sheet is prepared at the same time as the entry in the Lodgment Register by a clerk who is in charge of the valuation sheets. The valuation sheets are kept up to date each day so that when a cheque is presented it is possible to find out from the valuation sheet how much can be withdrawn. The ledger keeper has no authority to pass a cheque if he finds that it involves an overdraft. If an overdraft has been arranged and the debit is within the advance value and the limit of overdraft, the bank accountant can pass the cheque. If the debit is beyond the advance value the cheque is put before the manager. The ledger keeper enters the cheque presented in the sanction book which contains several columns. One shows the date, the second the name of the customer, the third the amount of the cheque presented, the fourth the amount of the debit balance if the cheque is paid; the fifth is for the initials of the accountant or bank manager who passes it, and the sixth column which is headed 'Remarks' is used to state what the advance value of that particular customer is on that date and how the decision to pass the cheque presented has been arrived at. When it is desired to withdraw the securities deposited the customer fills in the withdrawal memo with the particulars of the scrip in hands it to the security clerk who verifies the position of the account. The withdrawal memo is then sent to the Current Account Department for the customer's signature on it to be verified and for the statement of the balance of the account. Appropriate particulars are then entered in the Withdrawal Register. Then the valuation sheet is brought up to date at once and the securities if released handed over.

The Security Ledger under the heading of S. N. Mitter shows that in the earlier part of May, certain securities had been deposited against overdrafts, but all those securities had been returned to Mitter by 23rd May. On that day therefore there was an overdraft of Rs. 1,46,211-2-9 pies against no security. On 25th May the overdraft had declined to rupees 1,12,065 against which there was no security. On 26th May a total amount of rupees one lac in Government Promissory notes of 3½ per

a cent. was deposited as security. Of these the following Government Promissory Notes were lodged in the morning

- (1) Rs. 25,000 3½ % G. P. Notes — 1842-43
No. CA003385
- (2) Rs. 25,000 3½ % G. P. Notes — 1865
No. CA004051
- (3) Rs. 25,000 3½ % G. P. Notes — 1900-01
No. CA003334

on lodgment memo Ex. 176 which was signed by Mitter. They were duly entered in the Security Inward Register and initialled there by Amin (Ex. 156/1). Trilokekar relates that at about 1 P. M. Amin sent for him to his room where he found Mitter sitting. Amin b handed Trilokekar the three Government Promissory Notes set out above and told him to enter them against Mitter's accounts and to bring them back to him. He said that the notes were not to be endorsed in favour of the bank as they were going to remain a short time only. Trilokekar took the notes to Gobindyo, the second custodian, handed them to him repeating the instructions he had received from Amin. Gobindyo prepared the lodgment memo and entered the Government Promissory Notes in the Security Inward Register. Then Trilokekar and Gobindyo took the register, the lodgment memo and the notes c back to Amin. Mitter signed the lodgment memo and Gobindyo wrote in the Security Inward Register "Notes held by the manager" and Amin initialled that. Amin said he would keep these notes in his safe and the two security custodians then left the room with the lodgment memo and the register. The notes were left with Amin. On the same day, these three G. P. Notes were duly entered in the Overdraft Lodgment Register and also in the Overdraft Security Register.

In the afternoon of the same day, 26th May 1939, at about 2.30 P. M. Mitter made a lodgment of another Government Promissory Note d for Rs. 25,000—1842-43 No. CA001013. On this occasion, Amin again sent for Trilokekar into his room where he found Mitter. Amin handed the note over with a lodgment memo in Amin's handwriting and gave the same instructions as in the morning. Trilokekar took the Government Promissory Note and the memo to the Securities Department and caused a clerk to make an entry of the note in the Inward Register. The entry had written opposite to it "Notes held by manager" and Amin initialled it in blue pencil. Some time later, Trilokekar took the note back to Amin's room where Mitter still was and handed it over to Amin. The particulars of this last note were duly entered in the Security Inward Register, the Overdraft Register and the

Lodgment Register. The amount of all these e notes to the total face value of rupees one lac was duly brought on to the valuation sheets as would appear from the sanction book (p. 43). On the same day 26th May 1939, Amin himself sanctioned the payment of two cheques (1) for Rs. 67,829 and (2) for Rs. 65,825 which brought the overdraft in Mitter's account up to Rs. 2,40,368. In the 'Remarks' column of the sanction book Amin, whose initials appear in the Initials column, took the four notes of the total face value of rupees one lac paid in that day into account as cover in the following way. Rupees one lac at market value of Rs. 96 less 10 per cent.=Rs. 86,400. This sum f of Rs. 86,400 is the advance value appearing in sanction book when the two cheques referred to were passed. Thus Amin was giving the overdraft on a security of four G. P. Notes registered as pledged with the bank that day. No more securities were paid in until 30th May. On 29th May it appears from the sanction book "Remarks" column that Rs. 86,400 was still the advance value for Mitter.

From the books of the bank it would appear, therefore, that on 26th, 27th, 28th and 29th May the bank held the securities of Mitter to the value of rupees one lac or thereabouts against the overdraft that Amin granted and g was continuing to grant to Mitter. Trilokekar and Gobindyo, the custodians of securities with whom the securities should have been deposited were naturally suspicious. Actually they had solid grounds for their suspicion because those Government Promissory Notes left the bank the same day and were never thereafter available to the bank as pledge against Mitter's overdraft.

The story of what happened to those Government Promissory Notes on that day is as follows: P. W. 55, M. P. Agarwalla, a stock-broker stated in his evidence that on 26th May, he received the two G. P. Notes—C. A. h 003385 and C. A. 001013 each for Rs. 25,000 from the firm of Loyalka. On the same day he received two other notes for Rs. 25,000, C. A. 004051 and C. A. 003334 from another stock-broker Jaganprosad. He sold these four notes to S. C. Bose (mentioned above) who was also a stock-broker and delivered all four notes to S. C. Bose that day. S. C. Bose returned all four notes to Agarwalla the same day, 26th May, between 4 P. M. and 5 P. M. and asked Agarwalla to sell them off. Agarwalla returned the notes to the persons from whom he had received them earlier in the day. Bose did not pay Agarwalla for the notes; so Agarwalla billed Bose for the difference in price and for interest on them the same day.

a Agarwalla's story is borne out by P. W. 35, Gopikissen Rajgoria, a clerk employed by Loyalka and P. W. 29 Jayaram Das, a clerk employed by Jaganprosad. The two notes, C. A. 003385 and C. A. 001013 which Agarwalla had got from Loyalka and sent back to him on 26th May, were returned by Loyalka to Agarwalla on 30th May, and sold by Agarwalla to other purchasers. The other two notes C. A. 003334 and C. A. 004051 were re-sold by Agarwalla on 29th May, to Shew Bhagawan and Sons, Stock-brokers and delivered to them the same day. It is clear therefore that after being deposited, the four notes were returned

b by Amin to Mitter who returned them whence he got them. It does not appear that Mitter was ever the owner of those notes and yet according to the Securities Ledger those G. P. Notes of the face value of rupees one lac were deposited with the bank on Mitter's over-draft and not withdrawn until 9th June. (After describing the lodgment of other securities (G. P. Notes) by Mitter with the bank, the return thereof by Amin to Mitter and the pledging of same by Mitter with other banks their Lordships proceeded.) The Security Ledger of the Bank of Baroda does not show that any of the G. P. Notes deposited there by

c Mitter from 26th May onwards were returned to Mitter before 9th June. Trilokekar stated in his evidence that on the evening of 30th May, Amin accompanied by the cashier brought him a sealed cover in which he stated were the securities deposited by Mitter on 26th and 30th May. He wished this cover to be kept in the cashier's cabinet in the strong room (which adjoined the Securities Department). This cabinet was under the dual control of the cashier Nagar and Trilokekar. Amin put the sealed cover in the drawer of the cabinet. On the evening of 31st May, Amin again came with Nagar carrying a sealed cover in which

d he said were the securities deposited by Mitter on that day. This sealed cover was put in the cashier's cabinet in the strong room. On the evening of 1st June, Amin came with another sealed cover which he said contained the notes deposited by Mitter that day. Amin did the same on 2nd June, with two covers—one purporting to contain notes deposited by Mitter that day and the other purporting to contain notes deposited by Ghose that day. Thus on 3rd June, there were five sealed covers purporting to contain G. P. Notes, four being deposited by Mitter and one by D. C. Ghose, in the strong room. On 3rd June, Trilokekar asked Amin how much longer the sealed packets would remain in the strong room and Amin replied that the parties expected the

floating of a new loan on 20th June, when they e would get higher rates of interest and the notes would be taken out. Evidently, Trilokekar was suspicious because on 3rd June, he wrote a letter (Ex. 186) to the acting manager of the Bank of Baroda at Bombay setting out his suspicions and fears. As a result of that letter a telegram was sent from Bombay office and received in Calcutta in the afternoon of 7th June. The telegram reads as follows :

"I confirm my instructions by telephone of to-day that all the sealed packets containing Government Securities held on account of S. N. Mitter and D. C. Bose (?) should be opened in the presence of Joint Custodians of Securities and the Accountant and that all four including yourself should report in writing f to me of their contents giving details of securities and the present balance of the two accounts. I also confirm that these two parties should not be allowed any advance against shares or securities and that they should be asked to repay all advances made to them."

There seems to be no reason why Amin should not have acted upon those instructions which came both over the telephone and by telegram at once, i. e., on 7th June. All the parties were in the bank. However, nothing was done on the 7th. The next day, 8th June, was a holiday. On 9th June, Amin sent for Trilokekar, asked him about his communication to the head office, then showed him the telegram mentioned above and said that Mitter g would come and pay off his overdrafts and take delivery of his securities. At 4 P. M. the same day Amin sent for Trilokekar and ordered him to bring the sealed covers. Accordingly Trilokekar and the cashier took the five sealed covers from the strong room and handed them over to Amin. Trilokekar then thinking that Mitter would be coming to take delivery of the securities instructed a clerk to prepare the withdrawal slips and make entries in the withdrawal register for Mitter's signature. At about 4.30 P. M. Amin sent for Trilokekar and Gobindyo to his room. h D'Souza, the bank's accountant at Calcutta was also there. Amin then told D'Souza, Trilokekar and Gobindyo to go outside with Mitter who was also there and satisfy themselves regarding the contents of the covers. Amin excused himself going with them saying that he had to attend an important meeting of the Local Bank Advisory Committee and also that he was satisfied about the contents of the covers. Thereupon the three bank employees with Mitter who carried the sealed covers went to the securities department. There Mitter opened two of the covers but did not take out the papers which were inside.

Two witnesses, Bhupendra Nath Banerjee, P. W. 56, and Sital Chandra Gupta, P. W. 57,

a who were standing near the securities department depose that they saw the contents of two of the covers partially pulled out. They say that the contents looked like G. P. Notes. On the other hand, Trilokekar, Gobindyo and D'Souza say that they did not see the contents of the covers. Trilokekar was asked by D'Souza to take down the numbers of the G. P. Notes which were supposed to be inside the covers, thereupon Mitter made the excuse that he had an appointment and walked back with the covers to the manager's room. Trilokekar and Gobindyo and D'Souza followed him. Amin came out of the room and Mitter b told him that he had to leave at once and that he would return later. Mitter thereupon departed leaving the covers with Amin, but Amin did not open the covers or show the contents to the others. When Mitter went to the securities department with the covers he handed to Trilokekar two cheques drawn by himself on the Central Bank of India — one for Rs. 1,15,000 and the other for Rs. 2,14,000. It was then after 4-30 P. M.—, after the usual banking hours. About 6 P. M. Mitter came back to the bank and he and Amin went to the securities department, Amin carrying the five covers. Amin asked Mitter to take out the contents of the covers in the presence of Trilokekar, Gobindyo and D'Souza whereupon Mitter appeared to be offended and said that the securities had been put in the covers in Amin's presence and sealed. Amin then gave back the covers to Mitter without opening them. D'Souza and Trilokekar protested saying that the head office instructions were not being carried out, but Amin replied that with the two cheques just mentioned and a sum of cash which had been paid in, the accounts of Mitter and Ghose showed a credit balance of Rs. 60,000. Thereupon, withdrawal memo (Ex. 188) requesting the delivery to bearer of the securities deposited by Mitter was signed d by Mitter and a similar one was prepared in respect of the securities deposited in Ghose's account. There was no authority to withdraw Ghose's securities. D. C. Ghose came the next day and signed the withdrawal memo (Ex. 189) in respect of his withdrawals. The Securities Ledger Overdraft records that the G. P. Notes deposited by Mitter were withdrawn on 9th June.

The head office were now thoroughly suspicious of Amin and on 13th June Mr. Jokhar was sent down from the head office and arrived in Calcutta to act as joint manager with Amin. He wrote a letter to the head office on 13th June 1939 (Ex. 244/1) to which he appended the list of the aforementioned

securities which appeared in the bank's register. On 14th, Amin sent the head office a letter which purported to set out all what happened on 9th June, although Trilokekar, Gobindyo and D'Souza did not agree with this account, and in the covering letter to that draft Amin stated "as the details of the securities have been furnished to you by Mr. Jokhar they are not sub-joined to the statement." Those details are set out in Ex. 244/2 where the details and numbers of the Government Promissory Notes are as recorded in the Securities Inward Register. Evidently at that time Amin was still contending that the covers contained the securities which had been recorded as deposited against the overdrafts. Again on 14th June, Amin wrote a letter to Messrs. Sanderson & Morgans, Attorneys in Calcutta, instructing them to claim payment from Mitter and Ghose in respect of their overdrafts and set out a list of the securities which is the same as those contained in the books of the bank. The letter contains these words: "Securities held in account of S. N. Mitter were taken delivery of by him on 9th June, by payment to us by cheque"

It is now necessary to go back to 9th June. On 7th June, when Amin received instructions from the head office to open the sealed covers, Mitter's overdraft stood at Rs. 5,14,155. 8th June was a holiday. On 9th June, Mitter was credited in his account with the following items:

By cheque transfer	... Rs. 70,000
By cheque transfer	... Rs. 60,000
By cheque transfer second clearing	... Rs. 130,000

which reduced his overdrafts, according to the books of the bank to Rs. 2,54,155. He then handed to Trilokekar at about 4 o'clock on 9th June, two cheques—one for Rs. 2,14,000 to be credited to the account standing in the name of Mitter and one for Rs. 1,15,000 to be credited to D. C. Ghose's account and was by h Amin's directions allowed to take away the covers deposited as securities. The cheque for Rs. 2,14,000 was drawn on the Central Bank and was dishonoured on 10th June, when presented, and again on 12th June when presented. The cheque for Rs. 70,000 was obtained as follows: On 9th June according to the prosecution and on 5th or 6th June according to the defence, a cheque was drawn by D. C. Ghose on his account with the Bank of Baroda in favour of S. C. Bose for Rs. 1,22,935-12-0. It was dated 13th June, that is to say, it was a post-dated cheque, and was marked "good for payment on 13th June" by Amin on behalf of the Bank of Baroda. This post-dated cheque marked "good for payment" by the bank on

^a which it was drawn appears to be in the nature of a bill of exchange accepted by Amin on behalf of the Bank of Baroda; the writing on the cheque with the exception of the signature of D. C. Ghose was in Amin's handwriting. The cheque was endorsed by S. C. Bose who took it to one G. D. Bhatler who gave in exchange for it two cheques : (a) for Rs. 70,000 and (b) for Rs. 50,000 in favour of S. C. Bose. Bose endorsed each of these cheques after which Mitter endorsed each and paid them into his account with the Bank of Baroda on 9th June. The cheque for Rs. 50,000 is part of the credit of Rs. 1,30,000.

^b As regards the balance of the credit of Rs. 1,30,000 on 9th June, that is to say, Rupees 80,000; this was the proceeds of a cheque drawn by Bhatler on the Netherlands Trading Society in favour of S. N. Mitter for Rs. 80,000 dated 9th June. The cheque was endorsed by Mitter and paid into his account. Mitter got that cheque from Bhatler as follows: On 9th June, Mitter gave Bhatler a cheque on the Bank of Baroda for Rs. 80,000 post-dated to 13th June. Mitter's post-dated (13th June) cheque in favour of Bhatler on the Bank of Baroda was never presented on the due date, as on 13th June Mitter asked Bhatler not to present the cheque and Bhatler refrained from presenting it. In the forenoon of 13th June, Mitter gave Bhatler a cheque drawn on the Imperial Bank of India by the Punjab National Bank in favour of Mitter for Rs. 2,40,000 dated 13th June, the cheque being endorsed by Mitter. In return for his cheque for Rs. 2,40,000 Bhatler gave Mitter : (a) a cheque drawn by him on the American Express Co., dated 13th June, for Rs. 1,60,000 which Mitter paid into D. C. Ghose's account in the Bank of Baroda; and (b) a cheque for Rs. 80,000 dated 13th June, drawn by Bhatler on the Netherlands Trading Society payable to Mitter. Mitter endorsed this cheque and gave it back to Bhatler in exchange for Mitter's post-dated (13th June) cheque drawn by Mitter on the Bank of Baroda in favour of Bhatler. As regards the credit of Rs. 60,000 on 9th June, this was the proceeds of a cheque drawn by Daga on the Bank of Baroda in favour of Mitter dated 9th June, and paid by Mitter into his account. Mitter came to get that cheque in the following way :

On 9th June, Mitter gave Daga a post-dated cheque dated 12th June, drawn on the Bank of Baroda for Rs. 92,000 and in return Daga gave Mitter: (a) his cheque for Rs. 60,000 (the one just referred to) and (b) two cheques totalling Rs. 31,000 which latter cheques Mitter paid

into his account in the Bank of Baroda on 10th June. On 12th June, Daga was asked by Mitter not to present the cheque for Rs. 92,000 and he refrained from presenting it. Daga says that Mitter paid him the amount of the cheque in cash on 12th June, and took back the cheque; but that the next day Mitter borrowed Rs. 95,000 from Daga and gave as security a cheque for Rs. 95,000 drawn on the Bank of Baroda dated 12th June, and certified by Amin to be "good for payment up to 17th June." The cheque drawn by the Punjab Bank on the Imperial Bank of India for Rs. 2,40,000 was obtained thus: On 13th June, Mitter paid into the Punjab National Bank a post-dated ^f cheque (20th June), drawn by D. C. Ghose on the Bank of Baroda in favour of Mitter for Rs. 2,75,000 and certified by Amin on behalf of the Bank of Baroda "marked good for payment on 20th June." In return for this post-dated marked good cheque the Punjab National Bank gave Mitter their cheque on the Imperial Bank, dated 13th June, for Rs. 2,40,000. Thus the three credits in Mitter's account with the Bank of Baroda on 9th June, namely, (a) Rs. 70,000, (b) Rs. 60,000 and (c) Rs. 1,30,000 were derived from moneys raised directly or indirectly through post-dated cheques drawn by Mitter or Ghose on ^g their account with the Bank of Baroda and certified "marked good for payment" on due date by Amin on behalf of the Bank of Baroda. It was through Amin's making these post-dated cheques on his bank "good for payment" that each of those credits was obtained. The allegation of the prosecution is that when Amin received orders from the head office on 7th June to open the covers and reveal their contents he delayed carrying out those instructions until the evening of 9th June in order to give Mitter a chance to reduce his overdrafts and actually did help Mitter to reduce his overdrafts from Rupees ^h 5,14,155 to Rs. 2,54,155 by marking post-dated cheques good for payment.

We now come to 10th June. The cheque for Rs. 2,14,000 which Mitter paid in, about 4 P.M. on 9th June was presented and dishonoured. On 10th June Mitter paid in Rupees 18,000 in cash and also Daga's cheques for Rs. 31,000. 11th June was a Sunday. On 12th June the cheque for Rs. 2,14,000 was again dishonoured. On 13th June Amin offered Jokhakar, who had come down as his co-manager, a pronote (Ex. 227) for Rs. 3,29,000 signed by S. N. Mitter and S. C. Mitter. On instructions from the head office Jokhakar refused to accept it and said he would only take cash.

a On 14th June cash amounting to Rs. 60,578 was paid into Mitter's account with the Bank of Baroda and cash Rs. 89,422 into D. C. Ghose's account with the Bank of Baroda. This cash was raised in the following way. On 13th June D. C. Ghose drew a cheque on the Bank of Baroda in favour of Mitter for Rs. 1,50,000. Amin, on behalf of the Bank of Baroda, certified it "good for payment on 19th June 1939." Mitter paid that cheque into his account with the Netherlands Trading Society and drew a cheque on the Netherlands Trading Society for Rs. 1,50,000 which he paid into his account with the Central Bank of India. He then drew from the Central Bank of India in cash Rs. 1,50,000 and paid it as follows : Rs. 60,579 into Mitter's account with the Bank of Baroda and Rs. 89,422 into Ghose's account with the Bank of Baroda.

On 16th June Mitter's account with the Bank of Baroda was credited with a cheque valued Rs. 1,45,000 which he obtained as follows : On 15th June Mitter bought and received from Santhalia G. P. Notes valued at Rs. 1,75,000 for the price of Rs. 1,82,555. Mitter deposited these notes with the Netherlands Trading Society and gave Santhalia his cheque on the Netherlands Trading Society for Rupees 1,82,555. Mitter then got from the Netherlands Trading Society a pay order by them in favour of himself for Rs. 1,45,000 which he paid into his account with the Bank of Baroda and obtained the credit above-mentioned. This brought Mitter's account with the Bank of Baroda in credit to a sum of Rs. 216-3-6 and Mitter thereupon was allowed to take away the dishonoured cheque for Rs. 2,14,000 which he had paid in, on 9th June. It will be remembered that on 9th June Mitter paid into D. C. Ghose's account a cheque for Rs. 1,15,000 drawn on the Central Bank of India, this cheque was dishonoured. When Mitter on d 14th June paid into Ghose's account cash to the extent of Rs. 89,422 that put Ghose's account in credit by the amount of seven annas and three pies, and on 16th June Mitter was allowed to take away his dishonoured cheque for Rs. 1,15,000. There was, however, a hitch with the Netherlands Trading Society because the Netherlands Trading Society refused to honour Mitter's cheque for Rs. 1,82,554-6-4 in favour of Santhalia which was to pay for G. P. Notes of the face value of Rs. 1,75,000. Mitter overcame that difficulty as follows : Mitter drew a cheque on the Bank of Baroda in favour of Mitters Ltd., for Rs. 1,82,000. That cheque was dated 12th June and was certified "marked good for payment on 19th June 1939" by Amin for the Bank of Baroda.

Whether this cheque was drawn on 12th June e or not is doubtful but on 19th June Mitter took this marked cheque to the Chartered Bank of India in Calcutta where he had an account; he paid it in and drew a cheque on the Chartered Bank for Rs. 1,82,000 in favour of the Netherlands Trading Society and gave it to the Netherlands Trading Society to put them in funds to meet Santhalia's cheque. The Netherlands Trading Society refused to pay Santhalia's cheque before the Chartered Bank cheque was cleared and sent the cheque to the Chartered Bank who gave the Netherlands Trading Society a debit note on themselves for Rs. 1,82,000. Thereupon, the f Netherlands Trading Society on 19th June paid Santhalia's cheque on the strength of the debit note. In due course the cheques which Amin had certified on behalf of the Bank of Baroda "marked good for payment" on certain dates were presented to the Bank of Baroda and were dealt with as follows :

June 17. (Mitter's Account) holder Daga, value Rs. 95,000 paid by debit in the account :

June 19. (Ghose's Account) holder Punjab National Bank Ltd., value Rs. 2,75,000. The Bank of Baroda refused to pay and judgment against them for the full amount was subsequently given by the Calcutta High Court. Appeal pending to the Privy Council :

June 19. (Ghose's Account) holder the Netherlands Trading Society, value Rs. 1,50,000 paid by transfer at the Reserve Bank of India : g

August 8. (Mitter's Account) holder Chartered Bank of India, value Rs. 1,82,000 paid.

The total loss to the bank of Baroda in these dealings is about Rs. 7,02,000. On 7th June, when Amin received instructions from the head office to give Mitter no more credit, Mitter's indebtedness with the Bank of Baroda was as follows :

June 7. Mitter — Dr. Rs. 5,14,155-6-6
Ghose — Dr. Rs. 1,26,399-1-9

Total Rs. 6,40,494-8-3.

On 16th June, when full use had been made of cheques "marked good for payment" the position in the books was as follows : h

June 16. Mitter — Cr. Rs. 216-3-6
Ghose — Cr. Rs. 0-7-3

Total Rs. 216-10-9.

But there were outstanding "marked good for payment" cheques for Rs. 7,02,000. There is very little or no dispute as to the above facts. The appellants have not been convicted of any offence based upon the improper obtaining of credit from the bank. Amin has been convicted of theft by a servant (S. 381, Penal Code) in respect of the G. P. Notes which he handed back to Mitter on the seve-

a ral occasions, and Mitter of abetting him in committing those thefts. They have further been convicted of conspiracy to commit those thefts.

The defence which the two accused have set up separately is that they have committed no offence at all; that Amin on his part who was charged with the management of the bank was given certain powers to deal with securities in the course of his management and that what he did he did in the ordinary course of business for the benefit of the bank in order to attract and keep Mitter who was a valuable customer. Mitter on his part contends b that all he has done has been to ask Amin for overdrafts for the purposes of his business and accept whatever benefits Amin was prepared to give him as a good customer. Further, it is pointed out by Amin that there is no evidence anywhere that he has profited in any way by the matters complained of, and by Mitter it is pointed out that there is no evidence against him that he has paid Amin anything to induce him to do what he did. Both the appellants in their written statement allege that the securities were handed back to Mitter by Amin under a pre-arranged agreement and that in the places of the several c G. P. Notes deposited, notes of equal value were deposited the same day by Mitter, and were in the sealed covers on 9th June. (After going through the evidence their Lordships rejected the defence story that notes of equal value were substituted in the covers when notes originally placed were returned by Amin to Mitter and proceeded.) It is clear that by reason of Amin returning the securities in question to Mitter the bank lost the whole value of those securities to which they were entitled under the terms of the letters of pledge dated 23rd April 1938, and 2nd June 1939.

d The next question is—does the return of the securities by Amin to Mitter and Mitter's acceptance of them in each case constitute a criminal offence contrary to the provisions of the Penal Code? It has been contended on behalf of Amin and Mitter that the terms of Amin's employment by the bank entitled him to return the securities in the way he did, and therefore Amin in returning them and Mitter in accepting them were not acting contrary to law. Amin was a servant of the bank—a manager employed in Calcutta and he held a power of attorney granted to him by the bank which gave him authority to do certain things. That power of attorney is dated 15th January 1937, and sets out that Amin in the service of the bank was appointed

attorney of the bank in Calcutta with power e —(inter alia) :

Para. 1. To direct, superintend and conduct the business of the Calcutta branch of the bank and to give such orders and directions in regard to the conduct and management of the bank as to the said attorney shall seem expedient :

Para. 2. To take possession of the cash and securities for the time being of the bank and all the books, accounts, deeds, papers and vouchers relating thereto :

Para. 6. To endorse, transfer, sell, hypothecate, pledge and negotiate promissory notes of the Government of India bonds, etc., and all other securities and documents whatsoever standing in the name or held by the bank :

Para. 7. To draw, accept, endorse, negotiate and sell Bills of Exchange and other negotiable instruments with or without security :

Para. 11. To make advances and receive deposits on behalf of the bank and to sign any deposit receipts in the name of the bank as the attorney shall be advised or think fit :

Para. 17. To compound or compromise with any person or persons for and in respect of any debt or debts at any time or times hereafter become due, owing, payable or belonging to the bank :

Para. 20. To accept and take securities for any debts due or belonging to the bank or which shall hereafter become due or owing and to give or grant any release or discharge or acquittances or receipts for the same or for any interest due thereon that may be necessary or may be required in the premises and to do and perform all such matters and things in regard thereto as shall effectually assure of transfer g the property, estate and interest therein of the bank.

Para. 30. And the bank hereby ratify and confirm and promises and agrees at all times to ratify and confirm all and whatsoever the said attorney shall lawfully do or cause to be done in, or about the said premises under and by virtue of these presents

It is contended that under those provisions of the power of attorney Amin was entitled to return the securities and that in doing so he committed no crime. It is proper here to consider what the position of Amin in law was. Amin was, as the power of attorney recites, in the service of the bank, that is to say, he was a servant of the bank, and subject h to the directions and control of the bank. That that was so is quite clear not only from the power of attorney but from the correspondence between Amin and the Head Office and the Bombay office recited above.

In relation to third parties Amin was entitled to be treated as the bank's agent under the power of attorney granted to him. Although the power of attorney authorised Amin to give such orders and directions with regard to the conduct and management of the bank as to him (Amin) should seem expedient, and although he might accept and take securities owing to the bank and give or grant any release, discharge or acquittances for the same and perform all such matters and things in

- a regard thereto as should effectually assure or transfer the property, estate and interest therein of the bank, Amin in exercising those powers was and was bound to act as a servant of the bank. One of his duties as a servant of the bank was to serve the bank honestly and faithfully, and if he did not do so in any considerable degree he could be dismissed by the bank from his employment. If Amin purporting to act under the power of attorney acted so dishonestly and in breach of his duty to his employers that he committed an offence against the criminal law, the power of attorney would not protect Amin
- b from the consequences of his crime since it was an implied and fundamental term of Amin's contract of service with the bank that he should not act in breach of the criminal law. The bank only promised to ratify what Amin should lawfully do or cause to be done under the agreement. Whatever the effect of the power of attorney was upon the rights of the third parties in civil proceedings it could not protect Amin if he broke the provisions of the criminal law.

- Notwithstanding the wide terms of the power of attorney, Amin was not in the position of being able to do just as he pleased at the Calcutta branch. On 6th April 1939, Amin in his report to the Head Office upon the two Mitter brothers intimated their net worth at rupees three to five lacs and stated that he considered them "good for ordinary but secured business engagements." It was his duty to his employers to obtain security for any considerable overdraft; that is plain from the fact that he, on behalf of the bank, had previously caused Mitter to execute the letter of pledge of 23rd April 1938, which contemplated a margin against Government securities of 30 per cent. That he continued to regard it as his duty to get security for Mitter's overdrafts
- c is shown by the fact that on 2nd June 1939, he obtained from Mitter another document of pledge similar to that of 23rd June 1938, which contemplated an overdraft of Rs. 5,60,000 against Government securities with a margin of 10 per cent. and that in May and June 1939, he regarded it as his duty to obtain security is shown by the fact that on 26th May, Government promissory notes valued at rupees one lac were deposited for the specific purpose of forming security against an overdraft which on 25th May had reached Rs. 1,12,065; and that on 30th May, a further security valued at Rs. 25,000 was deposited, and very much larger securities on 30th and 31st May, and 1st and 2nd June, totalling in all (including those securities deposited against D. C. Ghose's

account) Rs. 7,70,000 were deposited against overdraft.

It is impossible for Amin to contend that it was not his duty to get security of a greater value than the overdraft granted. Common knowledge and his own actions with regard to the deposit of the securities mentioned above show that that was his duty and he knew it. It was his duty on behalf of the bank to retain them under the contracts of pledge of April 1938 and June 1939 until such time as a corresponding amount of debt was paid off or that they were sold by the bank to satisfy the overdrafts. In clear breach of his duty to the bank, Amin shortly after each deposit handed the deposited securities back to Mitter. Mitter had no right to those securities; he had given them in pledge under the letters of pledge, and he had deposited them under lodgment memos which apart from the letters of pledge would give the bank a banker's lien upon them for the overdrafts; until the overdrafts were satisfied either pro tanto or completely. Mitter was not entitled to the return of the securities in corresponding part or as a whole. Amin as a bank manager knew that he was returning those securities to Mitter to enable Mitter to have the benefit of them in some way or other. Amin in so handing them back was acting not only in breach of his duty to his employers to act faithfully for and on behalf of his employers, but was acting in breach of the agreement entered into by himself on behalf of the bank and Mitter with regard to those securities on 23rd May 1938, and 2nd June 1939 and was wrongfully depriving the bank—his employers—of their property in those securities, thus causing them wrongful loss. At the same time he was giving those securities with all their benefits to Mitter, who was not entitled to them, and so caused him—Mitter—wrongful gain. In our view the handing back of the securities, at any rate, those deposited on 30th May, and 31st May, and 1st June and 2nd June, by Amin was done dishonestly within the meaning of S. 24, Penal Code, since they cause wrongful loss to the bank and wrongful gain to Mitter. Mitter was a businessman and he knew full well that the Bank of Baroda required securities for his overdrafts in the same way as the Netherlands Trading Society and the Central Bank of India with whom he had accounts at the same time. He knew full well as a businessman that it was Amin's duty to see that the Bank of Baroda got securities pro tanto against the overdraft and he knew each time he took the securities back from the bank after they had been deposited there

a by him, that Amin in handing them back was acting in breach of his duty to the bank and that he (Mitter) had no legal right to those securities. In short, he knew that he was achieving wrongful gain and that the bank was suffering wrongful loss. In effect, he was acting dishonestly under S. 24, Penal Code.

It may well be that neither Amin nor Mitter knew what dishonesty within the meaning of S. 24, Penal Code, means, but that they both knew they were acting dishonestly in the ordinary sense of the word is clear. To give overdrafts (including D. C. Ghose's account) aggregating Rs. 6,40,000 and to take b corresponding securities of the total value of Rs. 7,70,000 on the several dates between 26th May and 2nd June and have those securities entered in the books of the bank so that the head management and the directors should think that the proper security had been given, and then time after time on the various occasions when the securities were deposited to hand them back to the person who deposited them and make no entries in the books of the bank to show that they had been handed back and so show a false statement of affairs to the head office of the bank should they enquire, was not the conduct of an honest c man. To prevent the true state of affairs appearing, to defer obeying the orders of the head office, to produce the securities alleged to have been deposited within two days, and to avoid being there on the appointed occasion for opening the covers was not the conduct of an honest man. At or about the time when the head office was attempting to discover what the true state of Mitter's position regarding overdrafts and securities was to mark "good for payment" for subsequent dates cheques which enabled Mitter to raise money elsewhere and so put his account in apparent credit and to create an undisclosed d indebtedness of Mitter in respect of the marked good cheques, was in ordinary language, the act of a dishonest man attempting to cover up dishonest acts. Such was the conduct of Amin.

As regards Mitter who was a businessman, the giving of securities valued at rupees one lac on 26th May as an ostensible cover for an overdraft knowing that those securities were not his but obtained temporarily from other stockbrokers in the market was a dishonest act. The taking of them back contributed nothing to his dishonesty towards the bank. As regards the lodging of the securities aggregating a further sum of rupees five lacs on the several occasions 30th and 31st May and 1st and 2nd June Mitter knew full well that

he was only lodging them so that they could e be entered in the books of the bank as ostensible securities for his own overdrafts and then returned to him. He knew that what he was doing was in the ordinary sense of the word dishonest in the highest degree. Mitter's behaviour on 9th June was that of a man who knew that he had a dishonest transaction to cover up. Mitter's dealing with the marked good cheques from and after 7th June was clearly an attempt to cover up the position which had arisen through the earlier dishonesty of himself and Amin. In our view whether the ordinary or the statutory meaning under the Penal Code is given to the f word "dishonesty" it applies to the conduct of both Mitter and Amin with respect to the return of the securities in question on 30th and 31st May and 1st and 2nd June. With regard to the return of the securities deposited on 26th May it is extremely doubtful whether Mitter had any title to those securities and under those circumstances it is doubtful whether there was any real loss to the bank by their being returned in the way they were, because the circumstances of this case were such that Amin in all probability knew that they were not Mitter's property. It may be that some offence other than theft or criminal breach of trust was committed by Amin and Mitter in respect of the securities deposited on 26th May. But in view of the fact that we propose to convict both the appellants on a number of charges and of the further fact that no other charge in respect of those securities was framed against either of the appellants, we do not consider it necessary to decide the nature of that offence.

It has been suggested that the promissory note found in Amin's drawer by the Notary Public a few days after 15th June was a security for the loan. The prosecution has contended that the promissory note was not made h on the date which appears on it but was given on some later date late in May or possibly June by Mitter to Amin so that Amin could, if any difficulty arose, contend that that was a security for the overdraft. The promissory note was never entered in any of the security registers at any time as it ought to have been if it had been given for the purpose which the defence alleges. On the evidence we feel unable to differ from the conclusion at which the Chief Presidency Magistrate arrived with regard to it, namely, that it was not made or given on the date which appears, but given as the prosecution alleges as a make believe security. In any event the promissory note by Mitter added nothing to the obligations

a Mitter was already under to repay the money he had borrowed.

The next question is whether the giving back of the securities on 30th and 31st May and 1st and 2nd June, constituted the criminal offence of theft under S. 381, Penal Code, or some other criminal offence. There can be no doubt that these securities were each for a time in the possession of the Bank of Baroda and immediately afterwards were each dishonestly disposed of to Mitter by Amin. Whether the dishonest disposal by Amin of these securities comes within the definition of theft in S. 378, Penal Code, or not, the handing back by Amin to Mitter of those securities undoubtedly comes within the definition of criminal breach of trust in S. 405, Penal Code, which states :

"Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person to do so, commits 'criminal breach of trust.' "

The sections dealing with the offence of criminal breach of trust are more appropriate c in the present case than the sections dealing with the offence of theft. Amin on behalf of the bank had made the contracts of pledge which Mitter signed on 23rd April 1938 and 2nd June 1939. Pursuant to the first of those contracts Mitter on various dates between 30th May and 2nd June, deposited the securities with the bank as the words of each lodgment memo. show "for deposit against my account." In each case Amin initialled the lodgment memo. and the bank received the securities and entered them in its books and consequently enlarged its overdrafts accordingly. It was Amin's duty to take those d shares for and on behalf of the bank and he took them ostensibly and as far as the bank was concerned for and on its behalf. Those shares were under the terms of the contract of pledge and under the respective lodgment memos to be held as security against the overdrafts. By virtue of his position as manager and agent under the power of attorney, Amin was in possession of those securities for and on behalf of the bank to hold them and to deal with them in accordance with the terms of the contract of pledge made between the bank and Mitter. Amin had by the joint operation of the power of attorney, the contract of pledge and the lodgment of the securities been entrusted with the securities and with dominion over them to hold them

as security for the overdrafts. He dishonestly e disposed of that property in violation of the contract arising from the pledge and lodgment of the securities by returning them to Mitter knowing full well that each return involved a wrongful gain to Mitter and a wrongful loss to the bank, his employers. In our opinion, on each occasion—30th and 31st May and 1st and 2nd June—when Amin handed back the G. P. Notes to Mitter he committed criminal breach of trust within the meaning of S. 405, Penal Code. That Amin himself is not proved to have made a wrongful gain from his breaches of trust is immaterial as far as the commission of the offence under S. 405, Penal Code, is concerned. In our opinion, the proper offence which the accused Amin should be convicted of is criminal breach of trust in respect of each of the offences charged on 30th and 31st May and 1st and 2nd June. In a similar way, the offence committed by Mitter on each of those occasions was abetment of criminal breach of trust by Amin. The real substantive offences committed in this case were criminal breaches of trust and abetments. We are not satisfied that the charge of conspiracy to commit thefts has been established and as the charge was unnecessary, we set aside the convictions thereon. 9

In the course of his argument for the appellant Mitter, Mr. Carden Noad contended that the trial had been vitiated by misjoinder of charges and that the appellants had been prejudiced by the joinder of a large number of charges in respect of separate and distinct transactions. In our opinion, the various dealings which have been made the subject of the different charges were so intimately connected as to form parts of one and same transaction and consequently the joint trial of these charges was perfectly legal in view of the provisions of Ss. 235 and 239, Criminal P. C. We are further of opinion that in view h of the nature of these dealings, it was desirable that all the charges should be tried together and that the appellants were in no way prejudiced by the joint trial.

There is no dispute that Amin was employed as a clerk or servant of the Bank of Baroda nor that it was in that capacity that he was entrusted with dominion over the G. P. Notes. If, therefore, he was guilty of criminal breach of trust, he was liable to punishment under S. 408, Penal Code. Though no charges were framed under S. 408, Penal Code, or under Ss. 109/408, Penal Code, it is clear from the provisions of S. 237, Criminal P. C., that the learned Chief Presidency Magistrate might have convicted Amin of criminal breach of

^a trust and have sentenced him under S. 408, Penal Code, in respect of each of those dealings for which in fact a charge under S. 381, Penal Code, was framed. We are satisfied that by virtue of the provisions of S. 423 (1) (b) (2), Criminal P. C., we are entitled to alter the findings of the lower Court and sentence Amin under S. 408, Penal Code, and Mitter under Ss. 109/408, Penal Code. We therefore order that the findings arrived at by the learned Chief Presidency Magistrate with regard to charges Nos. 6 to 19 be altered, that the appellant Amin be found guilty of the offence of criminal breach of trust as a clerk or servant in respect of those dealings set out in charges Nos. 6, 8, 10, 12, 14, 16 and 18, and that appellant Mitter be found guilty of abetment of those offences, as set out in charges Nos. 7, 9, 11, 13, 15, 17 and 19; and instead of sentencing appellant Amin to one year's rigorous imprisonment under Ss. 379/381/120B, Penal Code, in respect of the first charge and to one year's rigorous imprisonment under S. 381, Penal Code, in respect of the second charge, we sentence him under S. 408, Penal Code, in respect of each of the charges Nos. 6 and 8 to undergo one year's rigorous imprisonment, the sentences to run concurrently. Instead of sentencing appellant Mitter to one year's rigorous imprisonment under Ss. 379/381/120B, Penal Code, in respect of the first charge and to one year's rigorous imprisonment under Ss. 381/109, Penal Code, in respect of the second charge, we sentence him under Ss. 409/109, Penal Code, in respect of each of the charges Nos. 7 and 9 to undergo one year's rigorous imprisonment, the sentences to run concurrently.

^d We set aside the convictions and sentences in respect of charges Nos. 1, 2, 3, 4 and 5 and acquit the appellants of those charges and we pass no separate sentences in respect of the other charges, namely, charges Nos. 10 to 19. With these modifications the appeals are dismissed. The appellants must surrender forthwith and serve out their sentences.

G.N.

*Order accordingly.***A. I. R. (31) 1944 Calcutta 106**

AKRAM AND PAL JJ.

Bhabani Prosanna Lahiri — Defendant
— Appellant

v.

Sarojini Debya w/o Jatindra Mohan Lahiri — Plaintiff — Respondent.

Appeal No. 656 of 1941, Decided on 22nd January 1943, from appellate decree of District Judge, Rangpur, D/- 21st December 1940.

(a) Limitation Act (1908), Arts. 116 and 89— Suit for money recovered under power of attorney—Power registered—Claim based on the power—Art. 116 and not Art. 89 held applied—Time and amount held certain and Interest Act held applied.

S and other cosharers executed a power of attorney in favour of B (who was also a cosharer) by a registered instrument. The terms were: "We hereby authorize our said attorney to withdraw and receive payment and pay and make over to us in proportion to our respective shares as above set forth such amount out of the said sum of Rs. 10,000, as is due thereto within a week of the encashment of the said cheque." A cheque of Rs. 10,000 was received by B, on the basis of the power of attorney but S, not having been paid, brought a suit against B:

Held that the Article applicable was Art. 116 and not Art. 89: ('16) 3 A. I. R. 1916 P. C. 182 and ('33) 20 A. I. R. 1933 P. C. 143, *Foll.* [P 107f]

Held further that the provisions of the Interest Act were applicable as certainties of sum and time existed: *Case law discussed.* [P 107g]

Limitation Act —

('42) Chitaley, Art. 116, N. 12; Art. 89, N. 4.

('38) Rustomji, Page 850.

(b) Contract Act (1872), S. 73 — Damages must arise from breach of contract and not collaterally by delay (*Per Pal J.*).

For awarding damages under S. 73 the loss or damage must arise in the usual course of things from the breach of contract. The law does not regard collateral or consequential damages arising from delay in the receipt of money: (1878) 7 Ch. D. 490, *Rel. on.* [P 109d]

(c) Practice—New plea—Objection not taken in written statement — No issue framed — It cannot be allowed at stage of argument if it involves questions of fact.

No objection to the maintainability of the suit on the ground that the plaintiff was divested of her interest on account of the adoption was specifically taken and no such issue was framed. The point, however, was sought to be raised at the time of the argument:

Held that the defendant cannot be allowed to raise a new point, involving a question of fact, at that late stage. [P 107e]

Jitendra Kumar Sen Gupta, Upendra Chandra Mallik and Jitendra Nath Bagchi —
for Appellant.

Atul Chandra Gupta, Sourindra Narayan Ghosh and Sudhansu Bhushan Sen —
for Respondent.

Akram J. — This appeal by the defendant arises out of a suit for the recovery of a certain sum of money claimed by the plaintiff in her 5 annas 3 gandas share in respect of the money (Rs. 10,000) received by the defendant from the Government of Assam on the authority of a power of attorney executed by the plaintiff and the other cosharers of the defendant. Briefly stated the plaintiff's case was that in the zemindari in pargana Karaibari in Dhubri District she has a 5 annas 3 gandas share, that the said zemindari was

a managed by the Secretary of State for India through the Deputy Commissioner of Garo Hills and in connexion with the profits from certain Hats in the zemindari, there arose a dispute between the Government of Assam and the cosharer proprietors which was finally settled by the Government of Assam agreeing to pay a round sum of Rs. 10,000 to the proprietors in full discharge of their claim on account of the past profits of the Hats, which fell due to them during the previous years, that the plaintiff with the other cosharers of the zemindari thereafter executed a power of attorney in favour of the defendant authorising him to receive their shares of the said sum of Rs. 10,000 and providing that within a week of the encashment of the cheque he shall make over to the plaintiff and the other executants the amount due to each according to their share; that the defendant received the cheque on 23rd February 1934 and duly encashed it but paid the plaintiff only Rs. 300 out of Rs. 3218-12-0 to which she was entitled in her share, that the plaintiff therefore was obliged to institute the present suit for the recovery of the balance Rs. 2918-12-0 and damages Rs. 729-11-0 on 22nd February 1940; that the defence inter alia was that the plaintiff had no title to the share claimed, that her suit was barred by limitation and that she was not entitled to damages.

Both the Courts below decreed the suit, the defendant thereupon preferred the present appeal. It has been urged before us by the learned advocate for the appellant, (i) that as admittedly the plaintiff had adopted a son, she was divested of all her interest in the estate and the suit therefore by her was not maintainable in the absence of evidence in favour of any arrangement with the adopted son by which she could have remained proprietress during her life-time,—40 C.W.N. 115¹ was clearly distinguishable in this respect, (ii) that the liability of the defendant was merely that of an agent to the principal under the power of attorney and Art. 89 and not Art. 116 was applicable and as such the suit was barred by limitation, (iii) that the Interest Act has no application as there was no fixity of time for payment expressed in the written instrument, the expression "within a week of the encashment of the said cheque" did not indicate a definite date—the order for damages by way of interest was therefore not sustainable.

As regards point 1—it appears that in Suit

1. ('35) 22 A.I.R. 1935 Cal. 702 : 159 I.C. 1101 : 62 C. L. J. 49 : 40 C.W.N. 115, Hemendra Nath Roy v. Jnanendra Prasanna.

No. 276 of 1935 instituted by the defendant at Rangpur he had questioned the validity of the plaintiff's marriage and impugned her title only in that way. In the present suit no objection to the maintainability of the suit on the ground that the plaintiff was divested of her interest on account of the adoption was specifically taken and no such issue was framed. The point however was sought to be raised at the time of the argument. We think that the Courts below rightly disallowed the defendant from raising a new point, involving a question of fact, at that late stage.

As regards point 2—the power of attorney contains the following terms

"and pay and make over to us in proportion to our respective shares as above set forth such amount out of the said sum of Rs. 10,000, as is due thereto within a week of the encashment of the said cheque."

These terms, in my opinion, constitute an express contract in writing registered to make payment and therefore falls within Art. 116, Limitation Act. Upon this stipulation the defendant would be liable to pay, apart from any basis of agency. Article 116 therefore seems to me to have been correctly applied, *vide* 44 Cal. 759² and 60 I. A. 183³ in this connexion.

As regards point 3—the document shows that money was to be paid in proportion to the shares and that payment was to be made within seven days of the encashment of the cheque. I think the amount and the date above indicated are sufficiently definite and certain to attract the operation of the Interest Act. Thus, all the contentions having failed the appeal is dismissed with costs.

Pal J.— This appeal is by the defendant in a suit for recovery of money. The plaintiff and the defendant are cosharers in a certain zemindari in pargana Karaibari in the district of Dhubri in Assam. The defendant has one-sixth share in it. The plaintiff claims to have 5 as. 3 gds. share in the zemindari. The zemindari was under the management of the Government of Assam under a certain agreement with the proprietors. The Government used to pay malikana to the proprietors. There are certain hats (market places) within the zamindari yielding profits. The Government made no payment in respect of the profits of these hats. The defendant started negotiations with the Government on behalf of all the cosharers and ultimately succeeded in inducing

2. ('16) 3 A. I. R. 1916 P. C. 182 : 39 I. C. 156 : 44 Cal. 759 : 44 I. A. 65 (P. C.), Tricomdas Coverji v. Gopi Nath Jue Thakur.

3. ('33) 20 A. I. R. 1933 P. C. 143 : 142 I. C. 788 : 11 Rang. 186 : 60 I. A. 183 (P. C.), Ram Raghubir Lal v. United Refineries (Burma) Ltd.

a the Government to agree to pay Rs. 10,000 for the past profits in respect of three of the hats and to make future payments according to the profits of these hats.

The plaintiff's case is that the defendant also received payment of this sum of Rs. 10,000 from the Government for and on behalf of all the cosharers on a written authority given him in this respect by them, that by the terms of the written authority the defendant was required to make payments to the several cosharers in proportion to their respective shares, that the defendant was thus liable to pay to the plaintiff Rs. 3218-12-0, that out of
b this he paid only Rs. 300 and did not pay the balance of Rs. 2918-12-0 in spite of repeated demands. The plaintiff claimed damages at 25 per cent. on this balance and laid her claim in this suit at Rs. 3648-7-0.

The defendant received payment of Rs. 10,000 on 23rd February 1934 and the present suit was instituted on 22nd February 1940. The written authority referred to by the plaintiff in her plaint the terms of which, according to her, gave her the right to claim and put the defendant under the liability to pay her share of the money severally to her is a registered document. The case of the defendant is that
c besides the trouble taken and the expenses incurred by him in respect of the three hats in question, he had to fight the Government in respect of a fourth hat and obtained a decree for Rs. 38,000 in respect of its past profits as also for the future recurring profit of Rs. 6000 per annum, that in consideration of all these troubles and expenses incurred by him and the benefits conferred on the cosharers including the plaintiff they agreed to allow the defendant to retain the sum of Rs. 10,000 now in question in the plaintiff's suit, that accordingly the plaintiff has no right to claim any portion of this sum, that the terms of the
d power of attorney which require the defendant to pay the amount to the several cosharers in proportion to their respective shares were fraudulently inserted therein without the knowledge and consent of the defendant, that the plaintiff's claim was barred by limitation and that the plaintiff had no title to the estate as asserted by the defendant in Title Suit No. 276 of 1935 in the Subordinate Judge's Court of Rangpur.

Admittedly the plaintiff's husband was a cosharer of the zemindari having 5 as. 3 gds. share in it. In Title Suit No. 276 of 1935 referred to in para. 4 of the defendant's written statement in the present case the plaintiff's title to this 5 as. 3 gds. share by inheritance from her husband was denied by the present

defendant on the allegation that her marriage with her alleged husband was invalid. At the hearing of the suit the defendant by his cross-examination got from a witness of the plaintiff that she had adopted a son. On this, at the time of the argument, the defendant gave up his case that the plaintiff was not the legally married wife of her alleged husband and wanted to make a new case that she ceased to have title to the estate after this adoption. The plaintiff met this case by setting up an ante-adoption agreement whereby her title to the estate remained unaffected by the adoption. The learned Subordinate Judge did not allow the defendant to make a new case at
f the time of the argument. He decreed the plaintiff's claim in full, holding: (1) that as the claim was based on a contract embodied in a registered power of attorney, Art. 116, Limitation Act, applied to this suit and it was not therefore barred by limitation, (2) that the defendant failed to establish the agreement alleged by him by which, according to him, the other proprietors agreed to give up their shares of money in favour of the defendant, (3) that the defendant accepted and acted upon the terms of the power of attorney with full knowledge of them. On appeal by the defendant the learned District Judge
g confirmed this decree and upheld the findings arrived at by the learned Subordinate Judge.

Mr. Sen Gupta appearing in support of the appeal before us assails this decree on three grounds, namely: (1) That the Court of appeal below was wrong in applying Art. 116, Limitation Act, to the present case, that the claim in the present case should be governed by Art. 89 of the said Act; (2) that in view of the admitted fact that the plaintiff had adopted a son, the Court of appeal below should have held that the plaintiff had no title to the money claimed by her; (3) that in any case the Court of appeal below should have
h held that the claim for damages was not maintainable; that such a claim could be sustained only under the provisions of the Interest Act; but that in the facts of this case the provisions of that Act had no application.

The defendant admittedly received payment from the Government on the authority of the power of attorney, dated 5th September 1933, and admittedly the plaintiff was one of the executants of this document. This is a registered document and is Ex. 1 in the present case. In para. 5 of her plaint the plaintiff based her claim to her share in the money on the basis of the terms agreed upon by the parties and incorporated in this document. The terms in question stand thus:

a "We hereby authorise our said attorney to withdraw and receive payment . . . and pay and make over to us in proportion to our respective shares as above set forth such amount out of the said sum of Rs. 10,000 as is due thereto within a week of the encashment of the said cheque."

This power of attorney was executed by eight persons and consequently the defendant became the agent of these eight persons jointly under this power. His liability as agent to his principals would have been a joint liability to these eight persons. His several liability to each one of these eight persons was a matter of special agreement and such several liability was created by the special terms agreed upon by the parties and incorporated in the registered document. The present claim of the plaintiff for her share of the money alone is supportable only by the terms of this registered document and the plaintiff expressly bases her claim on these terms. Her suit, therefore, is, in my opinion, a suit for compensation for the breach of a contract in writing registered within the meaning of Art. 116, Limitation Act. The Court of appeal below has not, in my opinion, committed any error in applying that article to the facts of this case.

As regards the second point urged by Mr. Sen Gupta, the alleged admission by the plaintiff's witness that the plaintiff had adopted a son does not even refer to the date of this adoption. The defendant did not make any case of cessation of her title on adoption in his written statement. He assailed her title alleging defect in her marriage with her alleged husband. This case was given up at the hearing and the defendant wanted to make a new case which certainly involved questions of facts other than those elicited by the defendant on cross-examination of the plaintiff's witness. The plaintiff had no opportunity of meeting this new case. Further, the plaintiff's claim was based on the special contract incorporated in the registered document referred to above. Admittedly, she was a party to that document and admittedly it was on the authority of the power derived from her that the defendant could receive the money. In these circumstances the Courts below were right in disallowing the defendant to make the new case as above stated.

As regards the claim for damages, it must be conceded that no such damages will be payable under s. 73, Contract Act. That section allows compensation "for any loss or damage caused" to the party who suffers by the breach of a contract. The loss or damage must arise in the usual course of things from such breach. The law does not regard collateral or consequential damages arising from

delay in the receipt of money : (1878) 7 Ch. D. 490⁴ at page 494.

Admittedly there was no stipulation for interest in this case. Mr. Gupta appearing for the plaintiff respondent relies on the provisions of the Interest Act (Act 32 of 1839) in support of the plaintiff's claim for damages. Mr. Sen Gupta for the appellant contends that the provisions of the Interest Act would not help the plaintiff as in this case neither was there a sum certain payable nor was such sum payable at a certain time. His contention is that in order to bring the case within the provisions of the Interest Act there must be a sum certain and a time certain and these certainties must exist at the time the promise is made. It would not suffice if the certainty comes into existence at any later period. Section 1, Interest Act (Act 32 of 1839) runs thus : ". . . upon all debts or sums certain, payable at a certain time the Court . . . may . . . allow interest . . . from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time . . ."

As the preamble of this Act shows, this is really an extension of certain provisions of Lord Tenterden's Act (1833, 3 and 4 Will. IV, c. 42, s. 28) concerning the allowance of interest to British India. In fact, s. 1, Interest Act, 1839, is almost identical in terms with s. 28, Lord Tenterden's Act. The English decisions on that section of Lord Tenterden's Act, therefore, will be relevant for guidance. According to the decision in (1874) 9 Q. B. 99,⁵ if the sum becomes payable at a time fixed by reference to a contingent event which may or may not happen, it is not payable by the written instrument at a time certain within the meaning of s. 28 of Lord Tenterden's Act. As was pointed out by the Judicial Committee in (1929) A. C. 631,⁶ the above decision "was treated as authoritative by the Court of appeal in (1892) 1 Ch. 120⁷ and was viewed with benevolence by Lord Herchell in the House of Lords" in the same case : (1893) A. C. 429⁸ at p. 435. The same view was taken by the Judicial Committee in interpreting the Indian

4. (1878) 7 Ch. D. 490 : 47 L. J. Ch. 593 : 38 L.T. 195 : 26 W. R. 336, *Graham v. Campbell*.

5. (1874) 9 Q. B. 99 : 43 L. J. Q. B. 24 : 29 L. T. 809, *Merchant Shipping Co. v. Armitage*.

6. (1929) 16 A. I. R. 1929 P. C. 185 : 119 I. C. 615 : 1929 A. C. 631 : 98 L.J.P.C. 146 : 141 L. T. 370, *Maine and New Brunswick Electrical Power Co. Ltd. v. Alice M. Hart*.

7. (1892) 1 Ch. 120 : 61 L. J. Ch. 294 : 65 L. T. 722 : 40 W. R. 194, *L. C. & D. Ry. Co. v. S. E. Ry. Co.*

8. (1893) 1893 A.C. 429 : 63 L.J.Ch. 93 : 1 R. 275 : 69 L. T. 637 : 58 J. P. 36, *L. C. & D. Ry. Co. v. S. E. Ry. Co.*

a Interest Act itself in 7 M.I.A. 263⁹ where their Lordships pointed out that a sum certain was not payable by the written instrument at a certain time if its payment was contingent upon events which might never happen and the amount payable was capable of ascertainment only if and when those events happened and the time for the happening of those events, if they ever would happen, might be indefinitely postponed. In this case their Lordships had before them written contracts in the nature of wagers.

These are ample authorities in support of Mr. Sen Gupta's contention about the requirements of the Interest Act (Act 32 of 1839). The question, therefore, is whether these requirements are present in the case before us. In the case before us, there is no doubt that the sum payable was certain and was capable of definite ascertainment. In 7 M.I.A. 263⁹ their Lordships of the Judicial Committee while considering the question what is meant by a 'sum certain', and a 'time certain,' observed :

"With respect both to amount and time of payment, it was argued that the maxim *id certum est quod certum reddi potest* must be applied, and, in a reasonable sense, this is true It was argued also that in respect of both time and amount it was a question of degree and in the same reasonable sense that every statute is to be construed, not captiously, but with a view to the expressed intention of the Legislature : this is true also."

Later on their Lordships observed :

"The statute, by the qualifications which it imposes of certainty in time and amount, by requiring that this certainty and the obligation itself to pay the principal, should be created by a written instrument, by making the interest run from the time at which the principal is payable, and, finally, by giving the jury a discretion as to the allowance of interest even where all these circumstances concur, seems to have been framed, not simply on the principle of compensation to the creditor, but also on that of penalty to the debtor for not paying punctually at a time when he must have known the debt or sum, specific in amount, was to be paid."

d In the present case, no uncertainty attached to the amount payable. There was no uncertainty in this respect at the very time the promise was made. There was a writing in this case; no contingency as to the time of payment and no uncertainty of amount were responsible for the conduct of the debtor in not making payment punctually. In the facts of this case, it cannot be said that there was any uncertainty anywhere which would cause any hesitation in an honest debtor to pay. The debtor could not have been in the least doubt at the very date of his promise as to the amount payable and as to the time for payment.

9. (1857-59) 7 M. I. A. 263 : 4 W. R. 8 : 1 Suther. 357 : 1 Sar. 681 (P. C.), Juggomohan Ghose v. Manick Chand.

In my opinion, therefore, on a proper construction of the terms of the written contract it must be held that a sum certain was payable at a certain time in this case within the meaning of S. 1, Interest Act, (Act 32 of 1839). The decision of the Judicial Committee in 65 I.A. 66¹⁰ at p. 71 does not affect the view taken above. It was conceded in that case that the amount claimed was not a sum certain. In my opinion, therefore, the Courts below did not commit any error in allowing damages in this case. The amount of damages allowed does not even amount to interest at the rate of 4 per cent. per annum. I therefore agree that this appeal should be dismissed with costs.

R.K.

Appeal dismissed.

10. ('38) 25 A.I.R. 1938 P. C. 67 : 173 I. C. 15 : 65 I. A. 66 : I.L.R. (1938) 2 Cal. 72 : 32 S. L. R. 374 (P.C.), B. N. Ry. Co. v. Ruttanji Ramji.

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HENDERSON J.

Kumar Sarat Kumar Roy — Petitioner
v.

Rai Kiran Chandra Ray Bahadur and others — Opposite Party.

Civil Rule No. 704 of 1942, Decided on 6th January 1943, issued in the matter of application for setting aside order of Munsiff, Second Court, Jhenidah (Jessore), D/- 28th February 1942.

(a) Interpretation of statutes—Duty of Court.

The fact that hardship would be caused to persons is not a matter to be taken into consideration in interpreting the section. [P 111b]

(b) Bengal Tenancy Act (8 of 1885), S. 168A — "Decree-holder" is not synonymous to "landlord."

The word "decree-holder" in S. 168A is not synonymous with "landlord." Natural meaning should be given to the word. Hence the purchaser of interest of some landlord-decree-holders in patni sale prior to execution by other landlord-decree-holders cannot maintain an application under S. 168A. [P 111a,b,c] h

Gopendra Nath Das and Khitindra Nath Mitter
— for Petitioner.

Ramaprosad Mukherjee, Santosh Nath Sen and Hemesh Ch. Sen — for Opposite Party.

Order.—This rule raises a question regarding the interpretation of S. 168A, Ben. Ten. Act. It is opposed by opposite parties 1 to 9. The facts are these. When the rent suit was instituted the landlords were opposite parties 1 to 9, opposite parties 10 to 12 and opposite parties 16 to 25. The rent suit was actually instituted by opposite parties 1 to 12. The execution proceedings were taken by opposite parties 1 to 9. Opposite parties 10 to 12 were made parties, because they refused to join in the execution petition. The holding was pur-

a chased by opposite parties 1 to 9. The present petitioner filed an application under S. 168A (1) (b) on the allegation that he had purchased the interest of opposite parties 10 to 12 at a putni sale. This purchase took place on 15th May 1940 which was prior to the institution of the execution case. The prayer made by the petitioner is that opposite parties 1 to 9 should be compelled to deposit the rent which has become due between the date of his purchase in the putni sale and the date of the confirmation of the present sale. The important point to note is that the petitioner has not purchased the decree obtained by opposite parties 10 to 12. His contention however is that the word "decree-holder" really means "landlord."

The learned Munsiff delivered a careful judgment. He pointed out that hardship would be caused to persons in the position of the petitioner. He however rightly held that that was not a matter to be taken into consideration in interpreting the section. In dismissing the petitioner's application the learned Munsiff has given the natural meaning to the word "decree-holder." If the word "decree-holder" means "landlord," the drafting of the section will be about as bad as drafting could be. Not only that but the word decree-holder will have to be given two different meanings in the same sentence. It may very well be that the position of persons like the petitioner was forgotten at the time the section was drafted. In my judgment, the learned Munsiff would have been wrong to strain the language to give it a meaning which it could not possibly be asked to bear, unless some hardship would be caused to somebody. The rule is discharged. I make no order as to costs.

R.K.

Rule discharged.

A. I. R. (31) 1944 Calcutta 111

EDGLEY J.

Narendra Nath Chakravarty and another
— Defendants — Appellants
v.

Banamali Mandal and others —
— Plaintiffs — Respondents.

Appeal No. 584 of 1940, Decided on 12th January 1943, from appellate decree of Dist. Judge, Khulna, D/- 27th February 1940.

Bengal Tenancy Act (8 of 1885, as amended by 18 of 1940), S. 26G (1a) — Amendment has retrospective effect — Mortgage of 1926 — Possession delivered to mortgagee — Principal to be paid separately and no concern with usufruct — Mortgage comes within S. 26G (1a) — Period held mentioned in instrument.

The amendment to S. 26G (1a) effected by Bengal Act 18 of 1940 has retrospective effect and must be held to be applicable to the mortgage executed on 16th April 1926. The amendment affects every mortgage in which possession of land is delivered whether they fall within the express terms of the definition of "complete usufructuary mortgage" contained in S. 3 (3) of the Act or not. The language of the amendment is clear and the Court has no option but to hold that a mortgage in which possession of the land is delivered to the mortgagee falls within the purview of the section and must be deemed to take effect as a complete usufructuary mortgage with all the resultant consequences arising from such a finding even though the principal is to be separately paid and has nothing to do with the usufruct. [P 111h; P 112a,b,c]

[The period of nine years held the period mentioned in the instrument.] [P 112c]

Hemendra Chandra Sen and Suresh Chandra Sen
— for Appellants.

Biswanath Naskar and Amiya Kumar Mukherjee
— for Respondents.

Judgment.—In the suit out of which this appeal arises the plaintiff sued for foreclosure of a mortgage which had been executed on 16th April 1926, in favour of a man named Bharat Mandal. The appellants are the lessees under the original mortgagor. The case for the appellants is that the mortgage debt has been extinguished owing to the operation of S. 26G, Bengal Tenancy Act. It was held by the lower appellate Court that S. 26G, Bengal Tenancy Act, could have no application in a case of this particular mortgage which the learned Judge considered to be an anomalous mortgage. In this Court the learned advocate for the appellants has drawn my attention to the provisions of Bengal Act 18 of 1940, which has had the effect of amending S. 26G as it stood when this matter came before the lower appellate Court for consideration. The amended S. 26G (1a) reads as follows :

"(1a) Notwithstanding anything contained in this Act or in any other law for the time being in force or in any contract, every mortgage (including a mortgage by conditional sale) entered into by an occupancy raiyat in respect of his holding or of a portion or share thereof in which possession of land is delivered to the mortgagee (a) which was so entered into before the commencement of the Bengal Tenancy (Amendment) Act, 1928, and was subsisting on or after the 1st day of August 1937 . . . shall be deemed to have taken effect as a complete usufructuary mortgage for the period mentioned in the instrument or for fifteen years whichever is less."

Having regard to the language of sub-cl. (a) of the amended section this amendment clearly has retrospective effect and must, therefore, be held to be applicable to the mortgage now in suit. Further, it is clear that the amendment affects every mortgage in which possession of land is delivered with the result that all such mortgages whether they fall within the express terms of the definition of "complete usufructuary mortgage" contained in

a S. 3 (3), Bengal Tenancy Act, or not must be deemed to take effect as complete usufructuary mortgages. It, therefore, follows that the provisions of S. 26G (5) must apply to all such mortgages and the result will be that any such mortgage

"shall be deemed to have been extinguished on the expiry of the period (a) mentioned in the instrument of the mortgage, or (b) of fifteen years, whichever is less, from the date of the registration of the instrument, etc."

b It is argued by the learned advocate for the respondent in this case that it would be inequitable in the present case to apply the provisions of S. 26G of the Act having regard to the terms of the mortgage deed, which only make provision for the payment of the interest on the loan and for rents payable to the landlords from the usufruct of the mortgaged land. According to the terms of the deed, it was apparently the intention of the parties thereto that the amount due on account of the principal should be paid separately and should have nothing to do with the usufruct of the property. There is of course some force in what the learned advocate says on this point and it is possible that the Legislature may not have considered the hardship which the language of the amended sub-s. 26G (1a) may cause to individual creditors in cases such as this. The fact remains however that the language of the amendment is absolutely clear and I have no option but to hold that this mortgage falls within the purview of the section and must be deemed to take effect as a complete usufructuary mortgage with all the resultant consequences arising from such a finding.

c It is further argued by the learned advocate for the respondent that the period of nine years mentioned in the mortgage deed should not be regarded as "the period mentioned in the instrument" for the purpose of S. 26G, Bengal Tenancy Act. It so happens that in this case only one period has actually been mentioned in the mortgage deed, namely, the period from 1333 B. S. to 1341 B. S. With reference to this period the deed recites :

"I borrow Rs. 1150 from you after delivery of possession of the said lands to you, for a period of nine years, from the year 1333 B. S. to 1341 B. S."

a There can, therefore, be no doubt that the period of nine years was the period mentioned in the instrument in this particular case and there is also no doubt that this period has already expired. It follows therefore that the mortgage debt must be deemed to have been satisfied and that the plaintiff is entitled to no relief. This appeal must accordingly be allowed and the plaintiff's suit is dismissed.

The appellants are entitled to restoration of possession. I make no order with regard to costs. No order is necessary on the application, dated 6th August 1942, under the Bengal Money-lenders Act. Let the counter-affidavit filed in Court to-day be kept on the record.

R.K.

Appeal allowed.

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HENDERSON J.

*Rani Prova Roy w/o Babu Kshirode
Gopal Roy — Plaintiff — Appellant*

v.

*Subhash Chandra Biswas — Defendant f
— Respondent.*

Appeal No. 1070 of 1940, Decided on 29th March 1943, from appellate decree of Sub-Judge, Nadia, D/- 21st March 1940.

Bengal Village Self-Government Act (5 of 1919), S. 37—Occupier explained— Mere licensee is not.

A wife who is a cosharer with her husband in a certain zamindari, is not an occupier merely because the baitakkhana of the building owned by the husband is used as an office by the gomosta of the wife. The term "occupier" in S. 37 connotes at least that the person in question has a right of some kind to be there. A mere licensee cannot be an "occupier."

[P 112h; P 113a]

*Sarat Chandra Janah and Hiran Kumar Roy 9
— for Appellant.*

Paresh Nath Mukherjee (Jr.) and Sukumar Ghose — for Respondent.

Judgment. — This appeal is by the plaintiff and raises the question of the interpretation of the word 'occupiers' in S. 37, Bengal Village Self-Government Act. Both the plaintiff and her husband have been separately assessed on account of a certain building within the Union. Both of them instituted suits to challenge the assessment. No appeal has been preferred against the decree of the learned Munsif in the husband's suit.

There is now no dispute as to the facts: ^h The plaintiff is a cosharer with her husband in a certain zemindary. The baitakkhana of the building in question is used as an office by the gomosta. On these facts, it has been held that the plaintiff is an occupier of the building. If I have correctly understood the judgment of the learned Munsif, he held that an occupier must be something higher than a licensee, but that the plaintiff was so. The learned Subordinate Judge on the other hand, held that a mere licensee would be an occupier. The term has not been defined in the Act. But I see grave practical difficulties if a mere licensee is held to be an occupier. In the Oxford Dictionary the word 'occupier' is defined as "a person in possession, especially of

a land or house, holder, occupant." In my judgment, the term connotes at least that the person in question has a right of some kind to be there. Applying this test to the facts of the present case, the plaintiff is not an occupier.

But even adopting the interpretation made by the learned Subordinate Judge, it is difficult to see how it can be said that the plaintiff is a licensee. The actual licensee is the gomosta. He works for the plaintiff's husband—the actual owner of the property. There is nothing to show that the plaintiff is in any way responsible. It is not suggested that one of the terms of the contract of service between b her and the gomosta is that he should hold his office in this particular place or that she requested her husband to allow him to do so. On the facts found by the learned Subordinate Judge it cannot be said that she is the licensee of her husband with regard to this room.

The appeal is accordingly allowed, the decree of the lower appellate Court dismissing the suit is set aside and the plaintiff will be given a declaration that the assessment is ultra vires and an injunction restraining the defendant from realising anything under it. As there is no foundation for her allegation c that the defendant was actuated by improper motives in making the assessment, I shall not allow her any costs. Leave to appeal under S. 15, Letters Patent, is granted on the undertaking by Mr. Mukherjee that the respondent will not ask for costs.

R.K.

*Appeal allowed.***A. I. R. (31) 1944 Calcutta 113**

MITTER AND AKRAM JJ.

Nripendra Chandra Saha Choudhury and others—Plaintiffs—Appellants

v.

d *Md. Abbas Ali and others—Respondents.*

Appeals Nos. 159 and 210 of 1941, Decided on 23rd March 1943, from original decrees of Sub-Judge, First Court, Mymensingh, D/-27th Feb. 1941.

(a) Bengal Money-lenders Act (10 of 1940), Ss. 30 (1), 36 (1), Proviso (i) and 2 (16)—Loans on bonds adjusted by mortgage in 1917—Mortgage decree obtained in 1930—Last execution application in 1937—Principal of mortgage held amount treated to be so in mortgage bond and not that stated to have been actually advanced.

The defendants had borrowed money from the plaintiffs on simple money bonds. For securing the monies due on account of the principal and arrears of interest due on those simple money bonds the defendants executed a mortgage in favour of the plaintiffs on 3rd March 1917. The mortgage bond recited that the mortgagors had previously taken in all Rs. 3593 on the money bonds. The mortgage bond further recited that after crediting payments made

towards principal and interest and after remissions the sum of Rs. 4484 was then due on the simple money bonds. A sum of Rs. 188 was advanced in cash at the date of the mortgage bond. The sum total of Rs. 4484 plus Rupees 188 namely Rs. 4672 was agreed upon as the principal on which simple interest at the rate of 12 per cent. per annum was made payable. The mortgagees obtained a decree on the mortgage in 1930 and the last application for execution was made in 1937 and while it was pending the Bengal Money-lenders Act came into force. The mortgagor then applied for relief under S. 36. The question was what must be taken to be the "principal of the original loan" for the purpose of passing a new preliminary decree :

Held that on the assumption that the last execution application of 1937 was a "suit" within S. 36 (1) Proviso (i) the adjustment by way of mortgage which purported to close previous transactions and created new obligations having been entered into more than twelve years prior to the last execution application could not be reopened by reason of S. 36 (1), Proviso (i). The principal of the original loan under S. 30 (1) was therefore Rs. 4672 which was treated as the principal in the mortgage bond and not the money actually advanced by the mortgagee namely Rs. 3593 plus Rs. 188 equal to Rs. 3781. The fact that there was a recital in the mortgage instrument that Rs. 3593 was the amount advanced on the simple money bonds would not make any difference, for if the recital be given effect to for the purpose of ascertaining the principal on the footing of actual advance the agreement as contained in the mortgage instrument would be nullified. As that agreement could not be touched, the "original loan" must be taken to be what was secured by the mortgage instrument : ('43) 30 A. I. R. 1943 Cal. 137, Approved. [P 114h; P 115a,d]

(b) Bengal Money-lenders Act (10 of 1940), Ss. 34 (1) (a) (ii) and 36—Mortgage decree reopened—Instalments granted—Form of new preliminary decree.

Where a mortgage decree passed in a suit on a mortgage is reopened under the Act and instalments are granted to the mortgagor the form of the new preliminary decree would be that in default of payment of any instalment the mortgagee would have the right to apply for final decree in accordance with the provisions of S. 34 (1) (a) (ii). [P 116a]

Jatindra Nath Sanyal and Sibakali Bagchi—for Appellants in 159 & for Respondents in 210.

Urukramdas Chakravarty and Khan Bahadur Sharfuddin Ahmed—for Appellants in 210 and for Respondents in 159.

Mitter J.—These two appeals, the first by the mortgagees and the second by the mortgagors, arise in a suit to enforce a mortgage dated 3rd March 1917. The suit was instituted on 23rd December 1929 for the sum of Rs. 11,197, which represented the principal, as stated in the mortgage bond, and interest calculated up to the date of the institution of the suit at the rate provided for in the mortgage bond. The preliminary decree was passed on 9th July 1930 and the final decree on 8th November 1930, for a sum of Rs. 12,815-4-0, which included Rs. 1124-6-0 awarded as costs. There were some infructuous applications for execution. The last application for execution

a in the course of which the questions involved in these appeals arose, was made on 27th January 1937. This application was stayed for a time by the Debt Settlement Board, but ultimately the stay lapsed, as the debtors' application to the board made under S. 8, Bengal Agricultural Debtors Act was dismissed. This application for execution was pending when the Bengal Money-lenders Act, 10 of 1940, came into force. The mortgagors thereafter applied for relief under S. 36 of the last mentioned Act, which will hereafter be referred to as the Act. The learned Subordinate Judge has allowed the application. He has re-opened the preliminary and the final decree passed on 9th July and 8th November 1930 respectively, and has passed a new preliminary decree for Rs. 6961, for the principal and interest calculated up to 22nd February 1941, the date of the new preliminary decree. He has awarded Rs. 698 odd as costs. The total amount, namely Rs. 7659-12-4 has been made payable in five equal yearly instalments, the first of such instalments being made payable in Chaitra 1347 B. S. The decree has further provided that in default of payment of any instalment, the instalment unpaid will be recoverable in terms of S. 34, sub-s. (1), c. cl. (b) of the Act. In making the new decree the learned Subordinate Judge has taken Rs. 3781 to be the principal of the "original loan." He accordingly held that Rs. 3781 only was recoverable as interest and as Rs. 600 had been paid by the borrowers towards interest, the decree was made for Rs. 6961. Both parties have preferred appeals against his decree.

The material facts are as follows: Defendant 1, Abbas Ali and Dulal Bepary, the predecessor of the other defendants, had borrowed from time to time sums of money on simple bonds from the plaintiffs' predecessors, Hriday Chandra Saha Chowdhury and Bepin Chandra Saha Chowdhury. For securing the monies due on account of the principal and arrears of interest due on those simple money bonds the mortgage in suit (Ex. 1) was executed on 3rd March 1917 by Abbas Ali and Dulal Bepary in favour of Hriday Chandra Saha Chowdhury and Bepin Chandra Saha Chowdhury. The mortgage bond recited that the mortgagors had in the past taken the following sums of money on executing simple money bonds:

- (1) Rs. 3000 on 10th Kartick 1320 B. S.
- (2) Rs. 200 on 21st Kartick 1320 B. S.
- (3) Rs. 100 on 22nd Kartick 1320 B. S.
- (4) Rs. 100 on 29th Magh 1321 B. S.
- (5) Rs. 50 on 5th Magh 1322 B. S. and
- (6) Rs. 143 on 11th Jaista 1322 B. S.

Total Rs. 3593.

The mortgage bond further recited that after crediting payments made towards principal and interest and after remissions the sum of Rs. 4484 was then due on the simple money bonds. A sum of Rs. 188 was advanced in cash at the date of the mortgage bond. The sum total of Rs. 4484 + Rs. 188, namely Rs. 4672 was agreed upon as the principal on which simple interest at the rate of 12 per cent. per annum was made payable. The mortgagees admitted before the learned Subordinate Judge that the borrowers were entitled to relief. The learned Subordinate Judge has also held that they are entitled to relief. The principal controversy before him, and before us, is, what must be taken to be the "principal of the original loan" for the purpose of passing the new preliminary decree: whether (1) the sum of Rs. 4672 which was treated as principal, in the mortgage bond or (2) Rs. 3593 + Rs. 188 = Rs. 3781 or (3) a sum less than Rs. 3781. Before the learned Subordinate Judge the borrowers contended that Rs. 3593 had not been actually advanced by the lenders on the simple money bonds but a lesser sum, inasmuch as the simple money bond for Rs. 3000 item 1 recited in the mortgage instrument, was a renewed bond. They led evidence in support of their contention g on the point. The mortgagees on the other hand said that as the mortgage transaction cannot be re-opened in view of proviso 1 to S. 36, sub-s. (1) of the Act, it being beyond twelve years "of the suit," the principal must be taken to be what has been agreed upon by the parties in the mortgage instrument, namely Rs. 4672. The learned Subordinate Judge has overruled both these contentions. He has taken, as I have already stated, the sum of Rs. 3781 to be the principal of the original loan. For overruling the contention of the borrowers, he held that as the adjustment recorded in mortgage instrument cannot h be re-opened in the view of that proviso, the borrowers cannot say that Rs. 3000 was not the actual advance on the questioned simple money bond. He accordingly proceeded upon the recital of the mortgage instrument in fixing Rs. 3781 as the principal of the loan. In his judgment, however, he gave no reasons for repelling the contention of the mortgagees.

The mortgagors do not challenge before us the finding of the learned Subordinate Judge, but the mortgagees do. They urge that Rs. 4672 has to be taken as the principal of the original loan. The parties have proceeded before us on the footing that proviso 1 to S. 36, sub-s. (1) of the Act, prevents the re-opening of the mortgage. That is the conclu-

tion of the learned Subordinate Judge and that conclusion would be right if the "suit" mentioned in that proviso would include the application for execution, which in this case, was made in 1937, that is beyond twelve years of the mortgage. That view is in accord with what has been said by a Division Bench in 75 C. L. J. 485,¹ to which my learned brother Akram J., was a party. As the point has not been argued before us, I do not express any opinion but proceed upon the footing that the interpretation put upon the proviso in that case is correct.

The word "principal" has been defined in S. 2 (16) of the Act. Unless there is anything repugnant in the subject or context, it means the amount actually advanced to the borrower. When for the purpose of granting relief to the borrower a decree is re-opened, a new decree must be passed and that decree must be passed in conformity with the provisions of the Act. No interest exceeding the principal of the "original loan" or exceeding the principal then outstanding can be passed. (Section 30, sub-s. (1), cls. (a) and (b).) Ordinarily the principal of the original loan must be taken to be what had been actually advanced at the time of the first loan, not what has been regarded or treated by the parties as principal at the time of renewals. But that meaning must give way if it conflicts with proviso 1 to S. 36, sub-s. (1). The mortgage which we have before us proceeds upon an adjustment then made. It has purported to close previous transactions and has created a new obligation. The adjustment cannot accordingly be re-opened. In it an agreement is also embodied by which the parties agree to treat Rs. 4484 plus 188 i.e., Rs. 4672 to be the principal. That agreement cannot also be re-opened by the Court. If there had been no recital in the mortgage instruments that Rs. 3593 was the amount advanced on the simple money bonds the borrowers would not have been able to go behind the statement as regards principal as contained in the mortgage instrument. In my judgment, the fact that the original advance has been stated therein by way of recital would not make any difference, for if the recital be given effect to for the purpose of ascertaining the principal on the footing of actual advance the agreement as contained in the mortgage instrument would be nullified. As that agreement cannot be touched, the "original loan" must be taken to be what is secured by the mortgage instrument. The

definition as given in S. 2 (16) must therefore give way as being repugnant to the subject. Though no reasons have been given on this point in 75 C. L. J. 485,¹ this was what was done in that case. The decree of the learned Subordinate Judge is accordingly modified. The mortgagees would be entitled to Rs. 4672 by way of principal and + (Rs. 4672 - Rs. 600) by way of interest that is Rs. 8744 on account of principal and interest.

The mortgagees have raised two other points, namely: (i) that the lower Court in the exercise of its discretion ought to have awarded as costs the same amount which had been awarded in the original decree; and (ii) that the decree as passed is not in accordance with law. In my judgment both these points ought to succeed. Sub-section (2) of S. 36 of the Act gives power and a discretion to the Court to give costs in respect of the re-opened decree. In this case the re-opened decree was passed as far back as 1930. At the time of the institution of their suit, the plaintiffs were entitled to get a decree for the sum claimed in the suit. They were justified accordingly in paying the amount of court-fees which they paid on their plaint. That sum alone exceeds the sum of Rs. 698 which the learned Subordinate Judge has given as costs in respect of the re-opened decree, and accounts for more than three-fourths of the amount of costs originally decreed. The defendants by recourse to questionable tactics have prolonged the execution proceeding beyond 1st January 1939. In these circumstances, I think the sum of Rs. 1124-6-0 ought to be awarded as costs in respect of the reopened decree. The preliminary decree accordingly would be for the sum of Rs. 9868-6-0 plus the balance of the costs of these appeals which would be due to the plaintiffs.

In their appeal the defendants contend that at least ten yearly instalments ought to have been given. There is no justification for their prayer. The substantial part had been borrowed before 1917. The mortgage was executed in 1917 and only Rs. 600 had been paid up to now. They have substantial income from land and business. But as I am increasing the amount decreed by the learned Judge, I am prepared to give them seven yearly instalments. The first instalment awarded by the learned Subordinate Judge was due in Chaitra 1347 B.S. and the second is about to become due. In these circumstances, I direct the first instalment to be Rs. 2000 to be paid within Bysack 1350 B.S. and the balance to be paid in six equal annual instalments payable within Bysack of each year.

1. ('43) 30 A.I.R. 1943 Cal. 137 : 206 I. C. 89 : I. L. R. (1942) 2 Cal. 516 : 75 C. L. J. 485 : 46 C.W.N. 905, Jagabandhu De v. Akhoy Kumar Sil.

a The decree made by the learned Subordinate Judge is not in accordance with law. As the suit is on a mortgage the decree would be that in default of payment of any instalment the plaintiffs would have the right to apply for final decree in accordance with the provisions of S. 34, sub-s. (1), cl. (a) sub-cl. (ii), Bengal Money-lenders Act. The result is that both the appeals are allowed. The appellants in each of the appeals would get from their opponents the costs of the court-fees and the paper-book costs. The costs are to be set off against each other. The balance that may be found due to the plaintiffs appellants would be added to the preliminary decree on the mortgage. No hearing fee is awarded to any of the parties.

Akram J.—I agree.

G.N.

Appeals allowed.

A. I. R. (31) 1944 Calcutta 116

DERBYSHIRE C. J. AND GENTLE J.

Krishna Hydraulic Press Ltd.—

Applicant

v.

Commissioner of Income-tax, Bengal—

Respondent.

c Income-tax Reference No. 5 of 1941, Decided on 8th June 1943.

Income-tax Act (1922 as amended in 1939), Ss. 26 (2) and 34 — Company purchasing all assets of firm as going concern in 1938 — In June 1939 notice under S. 34 for assessment for 1938-39 — Amendment made in 1939 held not applicable — Company held successors of firm and held rightly assessed on basis of S. 26 (2) as stood prior to amendment in 1939.

d The assesseees were incorporated on 3rd March 1938, the main purpose of the company being to take over and purchase as a going concern the business of *J* firm together with all land, buildings, machinery and other appurtenances attached thereto. After the company's incorporation a sale deed was executed on 4th March 1938, by which, in consideration of sum of one lac of rupees, the company obtained immovable properties consisting of land, buildings, fixed machinery and other immovable properties of the mill and press and other legal incidents together with the good will of the business and the right to use the name and benefit of all contracts and all legal incidents. On 10th June 1939 a notice was served upon the company under S. 34 (1) in respect of an assessment which should have been made in the year 1938-39 and the company was assessed upon the profits of the concern from 29th September 1936 to 8th October 1937 :

Held that one item of gross profit was omitted, was not sufficient to show that the company were not the successors to the firm. The company were the successors to the firm and the business which the company conducted was that which was previously carried on by the firm prior to the incorporation of the company. [P 117b,c]

Held further that the assessment was to be made as if it were one which was effected in the year in

which escapement had been obtained i.e., in the year 1938-39 and the provisions of the amended Act did not apply since they would not have applied at the time the assessment should have been made. The assessment for the year 1938-39 made in 1939-40 was therefore correctly made on the basis of S. 26 (2), as it stood before it was amended by the Income-tax Act of 1939. [P 117h; P 118b]

Ramesh Chandra Pal — for Petitioner.

P. B. Chakravarty— for Income-tax Department.

Gentle J.— Prior to the month of March 1938, a firm named Jaidayal Sagarmal carried on a business of jute, hemp press, oil mills and iron foundry in Benares. The applicants, Krishna Hydraulic Press Ltd., were incorporated on 3rd March 1938, the main purpose of the company being to take over and purchase as a going concern the business of Jaidayal Sagarmal together with all land, buildings, machinery, and other appurtenances attached thereto. After the company's incorporation, a sale deed was executed on 4th March 1938, by which, in consideration of sum of one lac of rupees, the company obtained immovable properties consisting of land, buildings, fixed machinery and other immovable properties of the mill and press and other legal incidents together with the goodwill of the business and the right to use the name of Krishna Mill and Press and benefit of all contracts and all legal incidents of the Krishna Mills. The company has carried on that business ever since it was acquired on 4th March 1938. On 10th June 1939, a notice was served upon the company under S. 34 (1), Income-tax Act, in respect of an assessment which should have been made in the year 1938-39. On 20th August 1940, the assessment was completed and the company was assessed in a sum of Rs. 14,723. The assessment was made upon the profits of the concern from 29th September 1936 to 8th October 1937. It has been held by the appellate tribunal that the company is the successor to the firm of Jaidayal Sagarmal and alone is liable to be and has been assessed in respect of the profits during the year, the subject of assessment.

Two questions which now come for consideration are : (1) Whether on the facts found by the appellate tribunal a case of succession as contemplated by S. 26 (2) has been made out? (2) Whether the assessment for the year 1938-39 made in 1939-40 was correctly made on the basis of S. 26 (2) as it stood before it was amended by the Income-tax Act of 1939?

So far as succession is concerned the only point in the argument on behalf of the company that it did not succeed and is not the successor to the business of the old firm is by reference to one entry in a profit and loss

a account which was supplied by the company and is attached to the application under S. 66 (1) of the Act. In this profit and loss account the total receipts of the firm amount to Rs. 41,446-9-3, the expenses amount to Rs. 8860-15-9 and the difference between the expenses and the receipts is the sum of Rupees 32,580-14-9. Among the receipts, under the heading "Hemp a/c," is a sum of Rs. 5353-8-3. In the assessment a deduction has been made, under the head of "Profit from dealing with hemp (not taken over by this company)," of Rs. 5354. From this, it is argued that the company did not succeed to the firm as it did not
 b take over its hemp business. What the reasons were for this sum being deducted does not appear. By the sale deed of 4th March 1938, which was executed by the company and in respect of which, according to the deed, one lac of rupees was paid, the company acquired all the immovable properties including land, buildings, machinery and so on, together with the goodwill of the business and the right to use the name of Krishna Mill and Press and the benefit of all contracts and legal incidents. Whilst one item of gross profit was omitted, in my view that is not sufficient to show that the company are not the successors to the
 c firm. But the matter does not rest there. Fifteen months after the company was incorporated and obtained by means of a sale deed the assignment of the assets of the firm, its managing agents wrote on 30th June 1939 as follows :

"The present business of Krishna Hydraulic Press Ltd., was taken over from Messrs. Jaidayal Sagar-mal of Nandsah Mohalla, Benares, on 3rd March 1938 as a running concern and this company is working the press on and from the same date i.e., 3rd March 1938."

It has been conclusively shown that the company are the successors to the firm and that the business which the company conducts
 d is that which was previously carried on by the firm prior to the incorporation of the company.

The next question which arises is in regard to the provisions of S. 26 (2), Income-tax Act. By the amending Act of 1939, a substitution was made in this section. The 1939 Act came into force on 31st March of that year. Section 26 (2) originally provided that when one person succeeded to the business of another person, the person succeeding was liable for the whole of the income-tax ascertained from the profits of the year previously whilst the person succeeded was carrying it on. The substituted section provides that the succeeding person and the person succeeded shall respectively be assessed for their actual shares,

if any, of the income, profits and gains of the previous year.

On behalf of the applicant company, it was argued that since the assessment was made in the year 1940-41, although it is in respect of the year 1938-39, and since the substituted S. 26 (2) was in force at the time the assessment was made, its provisions should apply. Consequently, the applicant company should only be assessed in respect of the period during which it carried on the business and should not be assessed in respect of the whole of the profits for the year prior to the year 1938-39. It is conceded that the assessment has been made under S. 34 (1), Income-tax Act, which
 f is known as the escaping section. So far as is material, the section provides as follows :

"If in consequence of definite information which has come into his possession the Income-tax Officer discovers that income, profits or gains chargeable to income-tax have escaped assessment in any year . . . the Income-tax Officer may in any case in which he has reason to believe that the assessee had concealed the particulars of his income . . . serve . . . in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-s. (2) of S. 22, and may proceed to assess or re-assess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section."

The words which require particular attention are "have escaped assessment in any year." The assessment which was made in August 1940 was in respect of the year 1938-39 and it was made because in the year of assessment the company escaped assessment in that year and the provisions of the section can only be called into effect when, as is material, the Income-tax Officer has reason to believe the assessee has concealed the particulars of his income. This section enables an assessment to be made in a subsequent year when the assessee has escaped from being assessed. From what has he escaped? He has escaped
 h from an assessment which would have been made upon him during an earlier year. The object of the section is to overcome the result of an assessee escaping from an assessment which should have been made upon him. Another object, of course, is that there may be recovery from him of income-tax which he should have paid had the assessment been made during the correct period. From this, in my view, it must follow that the assessment made in a subsequent year must be the same as the assessment would have been, had it been made in the correct year. The fact that legislation has changed meanwhile does not in my view alter the circumstances. The assessment from which the company escaped

a in 1938-39 was an assessment in respect of the whole of the profits of the business to which it succeeded and which were made during the year of account, namely, the income-tax year immediately prior to the year 1938-39.

Attention has been drawn by the learned advocate on behalf of the company to the concluding words of S. 34 (1) that the "Income-tax Officer may proceed to assess" and "the provisions of this Act shall, so far as may be, apply as if the notice were a notice issued under S. 22 (2)." It was argued that at the time when the assessment in fact was made the provisions of the Act which were in force b at that period should be applicable. In my view, the assessment is to be made as if it were one which was effected in the year in which escapement has been obtained, in this case in the year 1938-39, and that the provisions of the Act do not apply since they would not have applied at the time the assessment should have been made. For these reasons, in my view, the answers to the two questions should both be in the affirmative. There will be no order as to costs.

Derbyshire C. J.—I agree.

R.K.

Reference answered.

c **A. I. R. (31) 1944 Calcutta 118**

ROXBURGH J.

Madaripur General Bank, Ltd. —

Defendant 1 — Appellant

v.

Mohiuddin Ahmed, guardian and manager of Court of Wards to estate of Maulvi Golam Sattar Choudhuri and Maulvi Golam Moula Choudhuri —

Plaintiff — Respondent.

Appeal No. 468 of 1940, Decided on 11th January 1943, from appellate decree of Sub-Judge, 2nd Court, Faridpur, D/- 2nd December 1939.

d (a) Civil P. C. (1908), S. 11 — Rent decree—*Ex parte*—Unexecuted—It has evidentiary value but does not act as *res judicata* unless in plaint declaration of rent is asked as substantive relief.

A previous decree in a rent suit, even though it has not been executed, has value as evidence as to the rate of rent in the same way as such a decree, if executed would have value although the fact that the decree has not been executed will be one of the circumstances to be taken into consideration along with other facts of the case in determining the value to be given to such a previous decree as evidence to establish the rate of rent. An *ex parte* decree in a previous rent suit will not operate as *res judicata*, even though there is a statement of the alleged rate of rent in the plaint, or a recital in the decree of the rate of rent alleged by the plaintiff, unless it can be shown that a declaration had been asked for in the plaint as part of the substantive relief claimed that the rate was at a specific figure. The value to be attached to the decree as evidence will, however,

vary with the circumstances of the particular case : *Case law discussed.* [P 119b,c,e; P 120a,b]

C. P. C. —

(44) Chitaley, S. 11, N. 15 Pts. 1-5.

(41) Mulla, Page 42.

(b) Bengal Tenancy Act (8 of 1885), S. 51 — Onus of proof.

Section 51 operates to throw the onus of proof of any change in the rate of rent on him who asserts it, when once it has been established that previously a given certain rate was in existence. [P 120b]

Hemendra Chandra Sen and Santosh Nath Sen
— for Appellant.

Dr. S. C. Basak and Bankim Chandra Banerjee
— for Respondent.

Judgment. — This appeal arises out of a judgment and decree of the Subordinate Judge, Second Court, Faridpur, confirming the decree of the Munsif of the First Court, Madaripur, in a suit for rent, namely Suit No. 69 of 1939 brought by the 10 annas proprietors in a superior interest. At the same time there was a claim by the 6 annas proprietors in Rent Suit No. 1783 of 1938 which was tried along with the suit out of which the present appeal arises. The plaintiff's claim was that the rental in his share was Rs. 18-9-6, while the tenant defendants alleged that the rental was Rs. 14-7-6 in 16 annas share. The C. S. Khattians published in 1914 support the defendants' case and show the lower rate both for the 6 annas proprietors and also for the tenant proprietors. The plaintiff relies upon an *ex parte* decree in Rent Suit No. 1343 of 1934, wherein he was made co-plaintiff in a suit brought originally by the 6 annas proprietors and the decree was given in his favour at the higher rate now claimed by him. In the same suit a decree was given in favour of the 6 annas proprietors at the lower rate, that is to say, the original rate shown in the record of rights and still claimed by them in their present suit, namely Rent Suit No. 1783 of 1938. Both the trial and the appellate Courts appear to have proceeded upon the assumption that the decree in Rent Suit No. 1343 of 1934 was executed; but it has been brought out in the course of this appeal that the extract from the suit register, Ex. 2, shows that in fact what was executed was only that portion of the decree relating to the claim of the 6 annas proprietors and that the claim of the present plaintiff for the higher rate amounting in all to Rs. 63-13-6 was not executed. The lower appellate Court, relying on two cases one of which has been given a defective reference of and is untraced and the other case in 91 I. C. 380,¹ has held

1. ('26) 13 A. I. R. 1926 Cal. 767 : 91 I. C. 380, *Maheswari Dei v. Gaurhari Maity*.

^a "an ex parte decree in a previous rent suit, though not strictly operating as *res judicata*, raises the presumption of S. 51, Ben. Ten. Act, and entitles the plaintiff to claim rent at the rate decreed in the previous suit, unless the defendant can show that the previous decree was obtained by fraud or by any irregularity or that the rate of rent has been changed or varied since then."

On behalf of the appellant, it is now contended that as it has been shown that the ex parte decree in the suit of 1934 has not been executed so far as it relates to the claim of the 10 annas proprietors, the decree is no evidence in the present suit as to the rate of rent and for this reference is made to the case in 1 C. W. N. cxxviii.² On behalf of the ^b respondent it is urged that the decision in the previous suit should operate as *res judicata*. In my opinion, neither of these contentions is sound. There has been some difference of opinion on the question as to whether a decree in a previous rent suit operates as *res judicata* on the question of the rate of rent or not; but I think that the decision of Full Court in 16 Cal. 300,³ has settled that such a decree will not operate as *res judicata*, even though there is a statement of the alleged rate of rent in the plaint, or a recital in the decree of the rate of rent alleged by the plaintiff, unless it can be shown that a declaration had been asked for in the plaint as ^c part of the substantive relief claimed that the rate was at a specific figure. As I understand that decision although it held in the circumstances stated that the previous decision would not operate as *res judicata*, it did not hold that the previous decision would not be evidence.

In the present case, nothing has been shown to bring it within the required category as laid down in the decision of the Full Court so as to make this case one in which the previous decision would operate as *res judicata*. The plaint itself has not been proved in the case. All we have is the extract of an ^d entry in the register of suit showing the nature of the claim and the decree. The decision of the Full Court in 16 Cal. 300³ has been discussed and to some extent criticised in the case cited by the lower appellate Court, namely the case in 91 I. C. 380.¹ But still it was held there that the previous decree in the circumstances therein stated would be evidence of the rate of rent. The trial Court in this case has proceeded on this basis, but the lower appellate Court has proceeded on the basis that the previous decree was no evidence at all as to the rate of rent. The value

to be attached to the decree as evidence will, ^e however, vary with the circumstances of the particular case. The lower appellate Court does not appear to me to have considered the evidence as a whole but treated the matter as practically decided on the basis of the case cited by it, namely the case in 91 I. C. 380,¹ and in so proceeding, in my opinion, had committed an error.

So far as it concerns the point taken by the appellant, I have examined the authorities referred to by Rampini J. in 1 C. W. N. cxxviii,² namely the cases in 16 Cal. 300,³ 20 Cal. 505⁴ and 1 C.W.N. 120,⁵ but I can find no support therein for the proposition that an ^f ex parte decree which has never been executed is no evidence as to the rate of rent. The first case referred to is the Full Court case already discussed above and it is certainly no authority for any such proposition. The other two are cases where in fact the decrees had been executed and the question as to the value as evidence of a decree which had not been executed could not have been and was not considered therein. All that can be said is that in the headnote of the case in 1 C.W.N. 120,⁵ it is expressed that the previous decree in a rent suit which has been executed is ^g "some evidence as to the rate of rent"—a niggardly expression of the value of such a decree not justified by the actual decision of the case as I read it, but from it, it might be deduced, if the decision were not examined, that it has been an authority to say that such a previous decision is of small value where the decree has been executed and if of no value where the decree had not been executed. The decision cited does not justify any such view, nor does the case in 20 Cal. 505⁴ which the later case in 1 C. W. N. 120⁵ purports to follow.

The two other cases that have been referred ^h to in the arguments in the appeal are (i) the case in 2 C. W. N. 172,⁶ another decision by Rampini J. which relies on 1 C. W. N. 120⁵ for the decision that an ex parte decree which has been executed is some evidence as to the rate of rent, and (ii) a brief note to the case in 2 C. L. J. 98n⁷ which also follows the above two cases in holding that an ex parte decree for rent which has been executed is good evidence so long as it stands unreversed. It may further be noted that it appears from the

2. ('97) 1 C. W. N. cxxviii, *Ram Chandra Dutt v. Haro Gobinda Bhattacharjee*.

3. ('89) 16 Cal. 300 (F. B.), *Modhusudan Shaha Mundul v. Brae*.

4. ('93) 20 Cal. 505, *Bakshi v. Niramuddin*.

5. ('97) 1 C. W. N. 120, *Madhu Munjari Chowdhurani v. Jhumar Bibi*.

6. ('98) 2 C. W. N. 172, *Mati Lal Poddar v. Nripendra Nath Ray*.

7. ('06) 2 C. L. J. 98n, *Atarannessa Bibi v. Golabdi*.

a report that the decrees considered in the Full Court case referred to above had not been executed. The question "whether an ex parte decree operates so as to render any question decided res judicata in the absence of proof that the decree had been executed" was not decided in the Full Court case; it was not necessary to do so, because the Court held in the particular case that it had not been shown that the previous decree operated as res judicata. In my opinion, a previous decree in a rent suit, even though it has not been executed, has value as evidence as to the rate of rent in the same way as such a decree, if executed would have value although the fact that the decree has not been executed will be one of the circumstances to be taken into consideration along with other facts of the case in determining the value to be given to such a previous decree as evidence to establish the rate of rent.

b As regards S. 51, Bengal Tenancy Act, my view is that this section operates to throw the onus of proof of any change in the rate of rent on him who asserts it, when once it has been established that previously a given certain rate was in existence; this would be equally true whether or not the rate be established by the use of a previous decree as rendering the matter res judicata, or by using such decree as a piece of evidence to be considered in determining the fact.

c In my opinion, therefore, it will be necessary to remand the present case for a proper determination of the fact by the lower appellate Court after giving due consideration to all the circumstances including the entry in the record of rights in 1914, the ex parte decree and the fact that the ex parte decree has been executed in part as to the 6 annas share of rent at the lower rate and has not been executed in part as to the 10 annas share and any other circumstances placed before it by the parties.

a Some reference has been made before this Court as to the effect of ss. 29 and 30, Bengal Tenancy Act. These are considerations in determining the question of fact as to what is the rate of rent and to the value of the decree in the suit of 1934 as showing what that rate was. It has been urged that the decretal rate is so high compared with that shown in the record of rights that it must be wrong as offending against ss. 29 and 30, Bengal Tenancy Act, in the absence of anything to show justification for the enhanced rate. But the argument in this form may beg the question, because it may be held that that decretal rate is correct because such a rate had been in

existence from before and in fact it is the record of rights which is wrong. It is for the appellate Court in going into the question of fact to consider the whole matter in all its aspects and to make its own conclusion of fact as to what has been shown by the evidence before it to be the rate in the 10 annas share of the plaintiff appellant. Both sides will be at liberty to adduce evidence.

The result is that this appeal is allowed; the decree of the lower appellate Court is set aside and the case is remanded for disposal by that Court in the light of the above remarks. There will be no order as to costs in this Court.

R.K.

*Case remanded.***A. I. R. (31) 1944 Calcutta 120**

HENDERSON J.

Profulla Kumar Roy Choudhury and another — Accused — Petitioners

v.

Emperor.

Criminal Revn. No. 847 of 1942, Decided on 21st January 1943.

Criminal P. C. (1898), S. 412 — Plea obtained by trickery is no plea of guilty precluding accused from asking for relief except reduction of sentence.

No doubt under S. 412 persons who plead guilty can only appeal on the ground of sentence. But they are entitled to satisfy the Court that there was in fact no plea of guilty. A plea obtained by trickery is not a plea of guilty within the meaning of the Code and would not preclude the accused from asking for any relief except the reduction of the sentences and the setting aside of the order of confiscation.

[P 121c]

Cr. P. C. —

('41) Chitale, S. 412, N. 1, Pts. 2-4a.

('41) Mitra, Page 1303.

*Satish Chandra Mukherjee and Profulla Kumar Chatterjee — for Petitioners.**Anil Chandra Roy Choudhury — for the Crown.*

Order. — This is a rule calling upon the District Magistrate of Khulna to show cause why the conviction of the petitioners under S. 9 (a) and (b), Salt Act, should not be set aside. There is also an order of confiscation of the salt which is also attacked. On behalf of the Crown, Mr. Roy Choudhury pointed out that the learned Additional District Judge is mistaken about the provision of law applicable to the confiscation and that the order in question was passed under the provisions of the Code of Criminal Procedure.

The petitioners pleaded guilty. The only reason why I issued the rule was the allegation made in para. 6 of the petition. That is to the effect that they had been told by the officer of the Salt Department that they would

a be very leniently dealt with and the salt would be returned to them if they made a plea of guilty. They supported the statement by an affidavit sworn personally in the lower Court.

Mr. Roy Choudhury contended that this affidavit is worthless because the petitioners cannot be prosecuted if it is false. Now there is no reason to suppose that the only reliable statements made are statements which if false would lead to prosecution. Affidavits by other defendants would be of little use. There is nothing at all unlikely in the statement made in the affidavit and there is no counter affidavit on the other side.

b Furthermore, there is strong corroboration of the truth of the affidavit in the proceedings that took place in the Magistrate's Court. The case was taken up for trial on 17th June 1942. There were three accused persons. One of them did not plead guilty and an adjournment had to be taken because the prosecution was not ready to go on as the witnesses were not present. From this it is quite obvious that there was some sort of discussion between the present petitioners and the officers of the Salt Department. Had that not been so, there would have been an application for an adjournment to produce the witnesses.

c Finally it was contended by Mr. Roy Choudhury that the appeal is barred under the provisions of S. 412, Criminal P. C. Of course under that section persons who plead guilty can only appeal on the ground of sentence. But they are entitled to satisfy the Court that there was in fact no plea of guilty. Now I have no hesitation in saying that a plea obtained by trickery is not a plea of guilty within the meaning of the Code. I am not satisfied that this was a proper plea of guilty which would preclude the petitioners from asking for any relief except the reduction of the sentences and the setting aside of the order of confiscation.

d Now this ground obviously does not entitle the petitioners to be acquitted. They can only ask for a retrial and it is for them to say whether they would press for a retrial and run the risk of obtaining a more heavy sentence. I have indicated that I shall not be prepared to reduce the sentence or to set aside the order of confiscation. In these circumstances a retrial was asked for. The rule is made absolute, the conviction and sentences are set aside and I direct that the petitioners be retried. The order of confiscation is also set aside.

R.K.

*Rule made absolute.***A. I. R. (31) 1944 Calcutta 121**

DERBYSHIRE C. J. AND LODGE J.

Emperor

v.

Joyram Pathak and others—Accused.

Criminal Revn. Nos. 456 to 461 and 520 to 524 and 526 of 1943, Decided on 10th November 1943.

(a) Defence of India Rules (1939), R. 81 (4)—Sentences under—Nature of.

The fact that the bigger dealers are never prosecuted for profiteering and those who sell at the source, never, or that the accused who sold the articles at over the controlled price had to pay more than the controlled price for the goods he dealt with or that the accused pleads guilty and appeals to temper justice with mercy is no reason for not giving sentences for what is a grave and growing evil namely profiteering and breaking the law which prescribes that goods and articles should not be sold at more than the controlled prices. Magistrates should not hesitate to use their powers, and where a fine of Rs. 1000 seems to them to be inadequate, to inflict imprisonment. It must not be considered that the only punishment for contraventions of the price-control orders is a fine. [P 122f, h; P 123c; P 125b]

(b) Defence of India Rules (1939), Rr. 81 (4) and 121—Contravention of price control orders—Prosecution for—Practice of dropping prosecution on accused contributing to police poor box condemned.

The practice of dropping prosecutions and acquitting accused persons who have contravened the price control orders on their contributing to the police poor box must be condemned and the sooner it ceases the better both from the point of view of the public and from the point of view of the police. The practice lends itself to abuse and an abuse which may bring those who use it within the reach of the law. [P 122g]

(c) Defence of India Rules (1939), Rr. 121 and 81 (4)—Selling or offering to sell and buying or offering to buy at above controlled price is offence.

Not only is it an offence against the anti-profiteering laws to sell at above the controlled price, but it is an offence to buy at above the controlled price. Moreover, it is an offence to quote a price above the controlled price or offer to sell above the controlled price or offer to buy at above the controlled price.

[P 124b, c] h

J. N. Majumdar and Debabrata Mukerji —
for the Crown.

S. C. Talukdar (in 457, 459, 460 and 520); Nikhil Ch. Talukdar (in 457, 459 and 523); Baidyanath Banerji (in 458); Biswa Nath Dhar (in 520); B. M. Chatterji and Hemanta Kumar (in 521); Probodh Ch. Chatterji and Bireswar Chatterji (in 522 and 524); Prafulla K. Mitra (in 523) and Bansorilal Sarkar (in 526) — for Accused.

Derbyshire C. J. — In the twelve cases of convictions under R. 81 (4), Defence of India Rules, namely, profiteering cases, this Court of its own motion issued Rules upon the respective persons convicted to show cause why their sentences should not be increased. We did so, as I have said, of our own motion

a because it seemed to us that inadequate sentences were being inflicted, and that the prosecution was not appealing against them. It is of course the duty of the Government to enforce the law. The High Court is only concerned with seeing that the laws are enforced according to their meaning and tenor; but we have power to call for the records of cases and examine them, and, if we think that they have not been dealt with correctly, to deal with them. But as I have said it is the duty of Government to enforce the law. As long as Ordinance 2 of 1942 was in operation, there were serious difficulties in the way of our
 b calling for the records of a case of profiteering, considering it and enhancing the sentence; but when Ordinance 2 of 1942 was repealed we were at liberty to do so, and we did accordingly call for the records of a large number of cases of profiteering which had been dealt with by Magistrates in the Calcutta area. We examined those cases, and in the twelve cases under consideration we issued Rules to show cause why the sentences should not be increased. It necessarily took some time for us to consider the cases and to have the records prepared, and they have been brought on at the earliest possible date. We have no
 c special staff to deal with cases of this kind.

The first batch of six cases was dealt with by a Magistrate at Alipore who did not, following the usual practice outside the Presidency, give a statement of the reasons why he passed the sentences that he did. The other six cases were decided in the Presidency Division and the Magistrate there gave reasons for what he did. We have perused the reasons that the Presidency Magistrate gave for the sentences that he imposed. In some instances he deals with the individual cases, but he also gives reasons of a more general nature. He says that in most cases the persons convicted and
 d sentenced by him were petty shop-keepers and hawkers and that they only charged one or two annas more than the controlled price. I may point out that in some instances they charged considerably more than one or two annas. He also says :

"I have seen cases in which the accused stated and proved that they were threatened with prosecution on previous occasions and they avoided it on payment of certain sums of money to the poor box maintained by the police and to such other funds, and they were prosecuted later as they could not make further payments. In some cases they were acquitted as the charges failed and in some they were let off with fines as it did not seem proper to pass severer sentences than what under the circumstances of the particular cases seemed adequate. Moreover severer sentences of fine can be of no avail as the accused will not be able to pay and will go to jail.

e Sending these people to jail will also serve no useful purpose. A panic will be created in the city to scare away the petty dealers from the market causing further and untold inconvenience to the public.

The bigger dealers are rarely prosecuted and those who sell at the source, never. No action is taken when the cases are found to be false by the Court. Frivolous cases are still coming in as usual.

The cumulative effect of all this is that when a petty shopkeeper or hawker is hauled up for trial and pleads guilty and explains why he charges a few pice more than the price fixed by Government and appeals to temper justice with mercy, the Magistrate has to take everything into consideration and pass a sentence which in his discretion and according to the circumstances of the case appears to him to be adequate. He has also to take into account that no sentence based on mere speculation regarding profits
 f being made by the accused persons can be supported by law. Also that they are arrested by police and are not released on bail till they are produced before a Magistrate. It often happens that they cannot give bail and remain in custody for sometime."

That is a general explanation. As I have said in most instances the over charge is more than one or two annas. As for the rest I cannot agree that that is a reason for not giving sentences which will be an effective deterrent for what is unquestionably a grave and, in my view, a growing evil, namely, profiteering and breaking the law which prescribes that goods and articles should not be
 g sold at more than the controlled prices.

I think that the remarks that he has passed with regard to the police poor box are of a grave character. This Magistrate is a Presidency Magistrate and presumably is well informed in this matter. I can only say that if contributions to the police poor box are used as a substitute for prosecutions according to law and punishments according to law, the sooner the practice ceases the better both from the point of view of the public and from the point of view of the police. The practice lends itself to abuse, and an abuse which may
 h bring those who use it within the reach of the law. Apparently, the practice is of old standing, but I think the remarks which the Presidency Magistrate has made and those which this Court has made are worth urgent consideration by the police. The Magistrate then goes on : "The bigger dealers are rarely prosecuted and those who sell at the source, never." I think there is a good deal of obvious truth in this observation. But that is no excuse for not enforcing the law where occasion requires. There have been some hundreds of prosecutions for profiteering; most of those have been against relatively small dealers such as shop-keepers. In some of the instances to-day, it has been alleged that the shop-keepers had to pay more than the controlled prices

a for the goods they dealt with and it has been used as some excuse for they themselves having sold at more than controlled prices. It is no excuse at all. But the fact that the matter has been raised gives the authorities notice that the larger dealers are not being dealt with according to law, and it gives the authorities an opportunity of enquiring from the smaller dealers as to whom they bought from, and the prices and terms on which they bought. It gives those responsible for the enforcement of the law a warning, and points out the way in which they can proceed to enforce the law against the bigger dealers.

b I can only say that this Court will watch the matter very anxiously. It is open to the persons who have been convicted and been before us to-day to give information to the prosecution in any case where they have bought at more than the controlled price, and it is their duty as citizens to do so and see that these law-breakers, who are in a bigger way of business than themselves, are brought to justice so that this system of wholesale breaking of the law — which is sometimes camouflaged by the term "black-market" — is put an end to.

I realise that the penalties which Magistrates are empowered to inflict are inadequate to the evil which has arisen. Under the Defence of India Rules, the maximum sentence is three years' imprisonment and/or a fine. The maximum fine which a Magistrate can inflict is rupees one thousand, and that fine may be altogether inadequate to prevent breaches of the law which result in profits running in some cases into lacs of rupees. Magistrates should not hesitate to use their powers, and where a fine of rupees one thousand seems to them to be inadequate, to inflict imprisonment. They must remember that they are acting in the interests of the

a community. I think it is desirable, nay more, I think it is essential that Magistrates should be armed with powers greater than those they have at present powers to inflict fines of a very much larger amount than rupees one thousand. If they are unable to do that and the Government are satisfied that the penalties inflicted are inadequate, they may bring the cases to this Court by way of revision or appeal (as I understand they are doing in other cases) and ask for enhancement, and this Court will not only support the Magistrates if they use their powers, but it will use such powers as it has to see that justice is done and that the evil which has grown up, is as far as is possible under the law, curbed, if not stamped out.

I now proceed to deal with the cases which have come before us. The first is that of Joyram Pathak from Alipore. This man sold soft coke at Re. 1-9-0 per maund when the controlled price was Re. 1-6-0 per maund. He pleaded guilty and was sentenced to a fine of Rs. 30 in default one month's rigorous imprisonment. In my opinion that fine is inadequate. Although notice of enhancement has been served upon him he has not taken the trouble to come here to oppose it. Every one knows that there has been profiteering in coke. In my view the proper sentence in this case is one of a fine of Rs. 500 in default rigorous imprisonment for three months. The sentence is altered accordingly. In the case of Ram Chandra Goala he, on 9th April 1943, sold a maund of coke for Re. 1-9-0 instead of Re. 1-6-0. He admitted the offence and was fined Rs. 30. That fine, in my view, is inadequate and must be increased to one of Rs. 500 in default rigorous imprisonment for three months.

The case of Kutai Shaw is interesting. He was charged with a breach of the law under R. 81 (4) of the Defence of India Rules, in that on 17th April 1943, he sold three seers of atta at 10 annas per seer when the controlled price was 0-6-6 pies per seer. The prosecution gave evidence that the controlled price of atta at that time was 0-6-6 pies per seer. Kutai Shaw admitted the offence and was convicted and fined Rs. 60. The learned standing counsel who appeared on behalf of the Government pointed out to us that in April of this year atta was not controlled in price. It was not controlled until August, so that at the time of the sale there was no controlled price fixed by law. The position in fact was that Government in order to alleviate hardship was, through its own agents, selling atta at 0-6-6 pies per seer, but there was no controlled price for all shops. It would appear that those responsible for the law against profiteering in this particular area had not been adequately instructed as to what the law was. The result is that the learned standing counsel agreed that this conviction must be quashed. Accordingly the conviction of and the sentence passed upon Kutai Shaw are set aside.

The next case is that of Jitu Marwari who was convicted by a Magistrate of Alipore for selling 2½ seers of sugar for Re. 1—9 annas on 17th April 1943, when the controlled price was 0-6-9 pies per seer. The accused admitted the offence and pleaded guilty. He was fined Rs. 60. The sale price on this occasion exceeded the controlled price by more than 50 per cent. The offence is a serious one. In our

a opinion the sentence must be altered to one of a fine of Rs. 500 in default rigorous imprisonment for three months. The next case is that of Nani Gopal De. He was convicted by the Magistrate of Alipore under R. 121 read with R. 81 (4) of the Defence of India Rules. His offence consisted in quoting the price of sugar as 8 annas per seer to a purchaser at his shop when the controlled price was together with the paper packet 7 annas per seer. There was no sale but merely a quotation. The accused pleaded guilty and he was fined Rs. 25. Rule 81 (4) provides :

b "If any person contravenes any order made under this rule, he shall be punished with imprisonment for a term which may extend to three years or with fine or with both."

Rule 121 provides, and it is most important to notice the wording of it, as follows :

"Any person who attempts to contravene, or abets, or attempts to abet, or does any act preparatory to, a contravention of, any of the provisions of these rules or of any order made thereunder shall be deemed to have contravened that provision or, as the case may be, that order."

c The result is that not only is it an offence against the anti-profiteering laws to sell at above the controlled price, but it is an offence to buy at above the controlled price. Moreover, it is an offence to quote a price above the controlled price or offer to sell above the controlled price and it is an offence to offer to buy at above the controlled price. That position should be noted by both dealers and the public. In this case, this shopkeeper when asked the price of sugar quoted 8 annas per seer. In so doing he broke R. 121 of the Defence of India Rules. Although no sale resulted, the quotation in itself was a breach of the law and it is important that breaches of the law of that kind should not go unpunished. Persons who have to buy the necessities of life very often have to send other people, sometimes children, sometimes servants, with *d* money and they are entitled to be supplied the goods at the controlled rates. If quotations are made above the controlled rates then the child or the servant may unwittingly pay money which ought not to be paid. It is necessary that that rule should be enforced. The Magistrate sentenced the accused to a fine of Rs. 25. In our opinion, that is inadequate and the fine must be altered to one of Rs. 250 in default two months' rigorous imprisonment.

The next case is that of Shib Charan Das Gupta who, on an inspector of the Department of Civil Supplies asking him in his shop the price of sugar, quoted 11 annas as the price of a seer of sugar, when the controlled price was 0-6-9 pies per seer without package. This again is a serious offence. The Magis-

trate fined him Rs. 30. This accused, though *e* he entered an appearance through an advocate, gave no further instructions to his advocate and has not been present in Court to-day. Perhaps he is of the opinion that the matter was of no consequence, but in that he is mistaken. He demanded a price of more than 60 per cent. above the controlled price. That was an offence and he must learn that it is a serious offence. The sentence upon him is altered to one of a fine of Rs. 1000 in default six months' rigorous imprisonment. The next batch of cases is from the Presidency Magistrate who dealt with these profiteering cases. The first one is the case of Makhan Lal De *f* who was convicted for having on 20th April 1943, sold a seer of sugar for 8 annas against the controlled rate of 7 annas. He was sentenced to pay a fine of Rs. 15. Here again the fine in our view is inadequate to the offence which has been committed. The sentence is altered to a fine of Rs. 250 in default two months' rigorous imprisonment.

The next case is that of Gopal Ch. Paul who was convicted of having sold a seer of sugar on 23rd April 1943, for a price of 10 annas against the controlled price of 7 annas. He pleaded guilty and was sentenced to pay a fine of rupees 30. He appeared through *g* advocate before us and stated that he paid above the controlled price for his sugar, and accordingly sold above the controlled price. In fact he sold at 43 per cent. over the controlled price. If that is so, he bought in the black market and sold in the black market. It was no excuse for selling in the black market, that he bought in the black market. It may be that his position like that of other dealers is an unfortunate one, but if he did pay more than the controlled price he could stop or help to stop it by informing the officer of the Civil Supply Department of the person from whom he bought and the price at which *h* he bought. In that way the bigger dealer can be brought to justice and something done to stop this black market traffic. In the same manner those responsible for the prosecution can take the cue from what has happened in this case and pursue their enquiries from each of the persons convicted as to from where they bought and the prices at which they bought and so bring the law-breakers, or at least some of them to book. In our opinion, the fine in this case should be one of Rs. 500 in default three months' rigorous imprisonment. The next case is that of Gangaram Kanu who sold coal on 18th April 1943, at the rate of Re. 1-12-0 against the controlled rate of Re. 1-6-0. He was fined Rs. 30. In our

a opinion there is no excuse for this offence and the sentence must be altered to one of a fine of Rs. 500 in default three months' rigorous imprisonment. The next case is that of Kartic Singh who was a hawker apparently carrying all his goods. He quoted a price for kerosene oil at 4 annas for 20 oz., the controlled price being 3 annas for 22 oz. He was fined Rs. 30. We see no reason to interfere with that sentence.

The next case is against Badri Nath Shah who on 18th April 1943 quoted Re. 1-12-0 for a maund of coal against the controlled price of Re. 1-6-0. He pleaded guilty. His story was that he bought at the rate of Re. 1-6-0. He *b* could have bought at the rate of Re. 1 which was the price of coal at that time in the sidings. He was fined Rs. 20. In our opinion, this sentence is inadequate and is altered to a fine of Rs. 500 in default three months' rigorous imprisonment. The next case is that of Nagen-dra Nath Nandi who sold on 20th March 1943, a bottle of kerosene oil for 5 annas instead of 3 annas. He was fined Rs. 50. We think the proper sentence in this case is one of Rs. 100 in default one month's rigorous imprisonment. We alter the sentence accordingly. I wish, in addition, to add that it must not be considered that the only punishment for contraventions *c* of the price-control orders is a fine.

Lodge J. — I agree.

G.N.

Order accordingly.

A. I. R. (31) 1944 Calcutta 125

DERBYSHIRE C. J. AND GENTLE J.

Commissioner of Income-tax, Bengal —
Applicant

v.

Gurupada Dutta and others —

Respondents.

d Income-tax Ref. No. 6 of 1942, Decided on 10th June 1943.

Income-tax Act (1922), S. 10—Assessee using building within union for his business — Rate imposed under Bengal Village Self-Government Act is allowable deduction.

The rate imposed under the provisions of the Bengal Village Self-Government Act, 1919, on a person occupying a building within the union and using the same for the purpose of business is an allowable deduction in computing the profits of the business under S. 10, Income-tax Act. [P 127a]

P. B. Chakravarti — for the Commissioner.

ORDER OF REFERENCE BY THE INCOME-TAX APPELLATE TRIBUNAL.

The Commissioner of Income-tax, Bengal, by his petition dated 11th February 1942, has asked us to refer to the High Court the following question of law as arising out of the

order of the Appellate Tribunal in appeal *e* R. A. A. No. 10 of Bengal of 1941-42.

"Whether the rate imposed under the provisions of the Bengal Village Self-Government Act, 1919, on a person occupying a building within the union and using the same for the purpose of business is an allowable deduction in computing the profits of the business under S. 10, Income-tax Act."

The respondent was required by the rules of the Tribunal to file his reply to the application. He has filed his reply and he objects to the reference on the ground that the question of law formulated does not arise. In the arguments addressed to us at the time of hearing, the counsel appearing for the respondent tried only to justify our order on the ground that the order is legally right. The counsel failed to show why the question formulated is not a question of law. The question formulated is so obviously legal that we did not consider it necessary to hear the applicant under R. 52 of the Tribunal Rules and a notice was issued to the respondent to file his objection, if any. By an order dated 9th December 1941, this Bench of the Income-tax Appellate Tribunal decided that the sum of Rs. 84 claimed as an expense by the assessee was an allowable deduction in computing the profits. The necessary facts in connexion with *g* this allowance may be mentioned :

Statement of the case. — The respondent carries on business at Nalhati where there is levied a union board tax. The Income-tax Officer merely disallowed the claim of Rs. 84 claimed by the respondent paid for the union board tax without recording any reason. The Appellate Assistant Commissioner, however, dealt with this matter in his order dated 12th February 1941 and he mentioned that the claim made is not to be allowed as this is a tax on profits. He considered that the tax has been rightly disallowed by the Income-tax Officer. This Bench of the Income-tax Appellate Tribunal took the view that the tax paid to the union board for occupying the business premises is an allowable deduction. The reason stated by the Tribunal was that the tax paid to the union board is for occupying the business premises and for doing business in the premises within the jurisdiction of the union. The payment was considered to be for the purpose of the business. Section 37, Bengal Village Self-Government Act of 1919, Local Self-Government Department (Government of Bengal Union Board Manual, Vol. I) deals with the imposition of the union rate and authorises the union board to impose yearly on persons who are owners or occupiers or owners and occupiers of buildings,

a within the union a rate stated therein. It reads as under :

"The union board shall impose yearly on persons who are owners or occupiers or owners and occupiers of buildings, within the union, a rate amounting to—

(a) the sum required, after deduction of the contribution, if any, made by the Local Government in this behalf, for the salaries and equipment of the dafadars and chaukidars and the salaries of the establishment of the union board, and

(b) the sum estimated to be required to meet the expenses of the board in carrying out any of the other purposes of this Act, if such estimate has been approved by more than half the total number of the members of the board at a meeting specially convened for the purpose,

b together with ten per cent. above such sums to meet the expenses of collections and the losses due to non-realisation of the rate from defaulters.

Section 38 then deals with the nature of assessment. It mentions :

"the rate to be imposed by a union board under S. 37 shall be an assessment according to the circumstances within the union and property within the union, if any, of the persons liable to the same."

Under S. 101 of the same Act, the Local Government was empowered to make rules to carry out the purposes of the said Act. Rules 1, 2 and 3 of the rules made in pursuance of the powers noted in the Local Government regarding the assessment and collection of the union rate read as follows :

c 1. (1) After preparing the annual budget estimate if account Form No. 1 and not less than two months and a half before the first day of the year to which the budget relates, the union board at a meeting shall proceed to assess the union rate provided in the estimate according to the circumstances and the property within the union of the persons liable to assessment: Provided that the said period may, for reasons to be recorded in writing, be at any time altered by the District Magistrate. (2) When a union board is for the first time constituted in any union it may assess the union rate for a portion of the year in which it is so constituted or of the year next, following :

d 2. The union board shall first prepare, village by village and in Form No. 1 a list of all persons owning or occupying buildings, whether with or without land appertaining thereto, in the union, either permanently or temporarily showing their trade, business, etc., within the union, and the estimated annual income which they derive from buildings or other property or business within the union. All such persons shall be included in the list even if some are subsequently exempted.

3. The board shall, after considering his debts and liabilities, if any, determine the total assessable income of the person concerned, i.e., the income which he derives from business conducted, or from buildings or other property held, within the union.

The applicant has relied on S. 10 (4), Income-tax Act, for the proposition that the sum of Rs. 84 should not be allowed. Section 10 (4) reads as under :

"Nothing in cl. (ix) or cl. (xii) of sub-s. (2) shall be deemed to authorise the allowance of any sum paid on account of any cess, rate or tax levied on the profits or gains of any business, profession or vocation or assessed at proportion of or otherwise on the

basis of any such profits or gains; and nothing in cl. (xii) of sub-s. (2) shall be deemed to authorise—
(a) any allowance in respect of a payment which is chargeable under the head 'salaries' if it is payable without British India and tax has not been paid thereon nor deducted therefrom under S. 18; or (b) any allowance in respect of any payment by way of interest, salary, commission or remuneration made by a firm to any partner of the firm; or (c) any allowance in respect of a payment to a provident or other fund established for the benefit of employees unless the employer has made effective arrangements to secure that tax shall be deducted at source from any payments made from the fund which are taxable under the head 'salaries.'

The allowance would not be admissible if it came within S. 10 (4). If the assessment of the Union Board tax was on the profit earned out of the business it is not to be allowed. In the view we have taken of the matter we held that it is not the tax on the income or on the basis of income but the levy is on the basis of the circumstances and property within the union. There are several matters to be considered in computing the assessable income of the assessment of the Union Board tax under S. 37, Union Board Act. The rules framed under this Act of the Bengal Village Self-Government Act of 1919, deal with the manner of assessment and there are several other circumstances than the income of the business to be taken into consideration in arriving at the amount of tax to be levied on each person. It is not in regard to income alone that the tax is levied. If the person within the union is in debt and not in good circumstances or has no property he may not be taxed. The tax, therefore, is not based on income from or profit of business but is a tax on circumstances and property and is not, in our opinion, covered by S. 10 (4), Income-tax Act. The question raised, however, being one of law, we have no hesitation to refer it to the High Court.

We, therefore, refer the following question to the High Court of Judicature at Fort William at Calcutta :

"Whether the rate imposed under the provisions of the Bengal Village Self-Government Act, 1919, on a person occupying a building within the union and using the same for the purpose of business is an allowable deduction in computing the profits of the business under S. 10, Income-tax Act."

The papers mentioned in the Index will form part of the reference.

Opinion of High Court

Derbyshire C. J. — We have had the advantage of hearing Mr. Chakravarti argue the case on behalf of the Commissioner of Income-tax against the opinion which has been expressed by the Appellate Tribunal. Notwithstanding that argument I am of the

^a opinion that the opinion expressed by the Appellate Tribunal is the correct one and I agree with the reasons that they have given for that opinion. I do not propose to complicate the matter by adding other reasons.

In my opinion the question asked "Whether the rate imposed under the provisions of the Bengal Village Self-Government Act, 1919, on a person occupying a building within the union and using the same for the purpose of business is an allowable deduction in computing the profits of the business under S. 10, Income-tax Act" should be answered in the following way—"yes."

^b The reference being a matter of public importance the respondent in this matter will be awarded costs to the amount of seven gold mohurs inclusive of all costs.

Gentle J.—I agree.

R.K.

Reference answered.

A. I. R. (31) 1944 Calcutta 127

BLAGDEN J.

Chandrabhan Bilotia and another

v.

Ganpatrai and Sons.

^c Petition in Suit No. 27 of 1942, Decided on 13th August 1942.

(a) Limitation Act (1908), Art. 158—Notice—It cannot be partly good and partly bad.

A notice of the filing of an award and of the day on which the Court would proceed to give judgment of the award cannot be partly good and partly bad, but if it is bad at all it is bad altogether. [P 129e]

(b) Award — Recital in award that all documents have been considered in absence of contrary evidence must be assumed that they must have been considered.

^d Where the award does recite that the arbitrators had carefully considered all the documents submitted to them, in the absence of any evidence to suggest that that is not true, it must be assumed that they had carefully considered all the documents submitted to them : (1842) 2 Dowl. (N. S.) 122, *Expl. and Not foll.* [P 129g,h]

(c) Arbitration—Strict rules of Evidence Act are not applicable to arbitrators — They must not however act contrary to natural justice.

If an arbitrator makes an honest mistake as to what the law of evidence is that, in itself, is not necessarily a ground for setting aside his award, because any tribunal may make a mistake as to law and the arbitrator has jurisdiction to decide wrong as well as to decide right. Besides the arbitrators are not bound by those strict rules which are applicable to Courts of law. They are not however to adopt any means of deciding the case which is contrary to natural justice. It is certainly not contrary to natural justice to act on materials on which ordinary and reasonable people would naturally act even though the materials be inadmissible in a Court of law : 1911 A. C. 179 and 1915 A. C. 120, *Rel. on.* [P 130d,e,f,g]

(d) Arbitration—Contractual tribunal — Procedure agreed by parties must be followed.

^e Just as a statutory tribunal must follow its statutory procedure (if any) right or wrong, so all decisions as to the course to be adopted in general by a contractual tribunal must be read as subject to that course if any which the parties to the dispute in a particular case have agreed that their tribunal shall adopt. [P 131e]

P. C. Ghosh — for Applicant.

S. N. Banerjee (Sr.) and S. B. Sinha —

for Respondents.

Order. — On 24th September 1941, the Champdany Jute Co. Ltd., made out a delivery order for 50,000 yds. hessian cloth in favour of Messrs Adamjee Hajee Daud & Co. Ltd., or order. Various dealings with this document took place, it being endorsed generally by those in whose favour it was drawn ^f and endorsed again by six persons or companies before finally this document came into the hands of the present applicants. Where a document of this kind is negotiated in this manner and treated as though it were the goods that it represents, that which takes place is sometimes called "symbolic delivery" of the goods. It is also, I think, quite accurate to say that it is a conditional delivery of the goods, much in the same way as the handing over of a cheque is a conditional payment of money, the condition being that when the holder of the order wants his goods ^g he should be able to get them by presenting it. On 1st October 1941, the present applicants sold the goods represented by this order, which had by then come to their hands, to the present respondents on the terms of a sold note in the Indian Jute Mills Association printed form which embodied certain printed terms and conditions. Payment and delivery were to take place ready cash against mills p. d. (standing for "pucca delivery") orders, and in fact on that date the present respondents paid for the goods and the present applicants endorsed and handed to them the delivery order. The 13th of the Terms and ^h Conditions read as follows :

"All matters questions disputes difference and/or claims arising out of and/or concerning and/or in connexion with and/or in consequence of or relating to this contract whether or not the obligations of either or both parties under this contract be subsisting at the time of such dispute and whether or not this contract has been terminated or purported to be terminated or completed shall be referred to the arbitration of the Bengal Chamber of Commerce under the rules of its Tribunal of Arbitration for the time being in force and according to such rules the arbitration shall be conducted."

The rules of the Tribunal of Arbitration of the Bengal Chamber of Commerce were, I understand, in the same form at all material times as far as this case is concerned and included the following provisions. By Rr. 11

a to 13 inclusive, documents corresponding to pleadings in litigation are to be delivered by the disputing parties and by Rr. 15 and 16 the following provisions were made:

15. "A dispute will normally be decided by the Court on the written statements of the parties and oral evidence will not be taken nor will the parties be entitled to appear or any formal hearing be held. The Court shall have power however if it thinks fit to appoint a time and place for the hearing of the reference and to hear oral evidence.

b 16. In any case of a formal hearing no party shall without the permission of the Court be entitled to appear by counsel, attorney, pleader, advocate or adviser but the Court in its discretion may require the parties with or without witness to attend before it or before any Sub-Committee or Sub-Committee of the Chamber to be examined."

"Court," I should say, means by R. 1 the arbitrator or arbitrators appointed for determining a particular dispute or the umpire where an umpire has been appointed. Rule 20 provides as follows:

"The Court may proceed with the reference notwithstanding any failure to file a written statement within due time and may also proceed with the reference in the absence or any or both of the parties who being entitled to appear before the Court after due notice refuse or neglect to attend."

Rule 37 provides:

c "All notices required by these rules to be given shall be in writing and shall be sufficiently given if left at the last known place of abode or business of the party to whom the notice is addressed or if sent by registered post addressed to him by name at such last place of abode or business."

The rest of the rules appear immaterial. All would have been well if it had not been for the fact that subsequently, in the course of dealing with the goods represented by the delivery order, a purchaser had chosen to pay for the goods by means of a cheque which was dishonoured on presentation; the result of this naturally was that the vendor took steps to see that the purchaser should not be able to get the goods, and he gave notice to the drawers (if that is the correct expression) d of the delivery order not to part with them; meanwhile, the gentleman into whose hands the delivery order had by this time come and who was unable to get the goods, found before long that he had lost his delivery order too, because the police obtained a search warrant and seized this piece of paper. The result was that as regards each dealing in the goods the purchaser made a claim on his vendor who in turn made a claim on his vendor etc., until eventually these backward claims reached the present respondents Ganpatrai & Sons Ltd. When this happened they gave notice that a claim had been made against them to the present petitioners, who by letter of 11th December 1941 professed complete lack of interest in the arbitration that was about to

take place between the respondents and their purchasers, and denied the jurisdiction of the Bengal Chamber of Commerce to determine any question between the present parties in the events that had happened. As a matter of fact the arbitration between the present respondents and their purchasers went on, and by a letter of 4th March 1942 the present respondents opened arbitration proceedings against the present applicants in purported pursuance of the arbitration agreement contained in the sold note. A copy of their letter was promptly forwarded by the Registrar of the Bengal Chamber of Commerce Tribunal of Arbitration to the present petitioners on 5th March 1942, and on the 6th Messrs. Ganpatrai & Sons Ltd., lodged with him certain statements as exhibits in support of their claim including their difference bill No. 143 in which they claimed the sum altogether of rupees 15,766-10-0. Notice of the constitution of a Court to decide the matter was given on 9th March and a copy of Messrs. Ganpatrai's last communication was forwarded to petitioners on 10th March.

The present petitioners by their solicitors on 16th March lodged a lengthy written statement, into the details of which I need not go which again was passed on Messrs. Ganpatrai & Sons Ltd., by the Chamber of Commerce. g On 21st March Messrs. Ganpatrai & Sons Ltd., sent to the Tribunal another very lengthy statement which consisted, in substance, of underlining the points they had already sought to make in their previous statement. This again was handed on to the present petitioners on the 23rd and they were told that they must make such comments as they desired by the 26th. On the 26th they did make another quite long statement in reply, and on the 28th Messrs. Ganpatrai & Sons Ltd., were invited to formulate whatever claim they might have against the present petitioners. They delivered what might (comparatively speaking) be called h a "concise statement" on 8th April and this again was passed on to the present applicants; the time for replying to it having been extended they finally did reply to it on 22nd April in which they stated that they referred to their previous statement and "had nothing further to add thereto." I may say that during this month of April the present applicants were moved by considerations for their own personal safety to leave Calcutta, but they left behind them to manage their business affairs others for whose personal safety they had less consideration and I am quite satisfied that there was always some responsible person at all reasonable times to be found at their

a gadi who could deal with business matters, in addition to which of course, their solicitors had not left Calcutta and were available to look after their worldly interests.

By two letters of the 7th, amended on 8th May 1942 which were left at the present applicant's gadi, the Registrar of the Tribunal of the Bengal Chamber of Commerce purported to give the present applicants notice "that the above arbitration" (meaning the arbitration now in question) "would take place at the Bengal Chamber of Commerce at 4 P. M. on Tuesday 12th May 1942." I had better read the body of the second letter because a good b deal turns on it but would remark both of them are headed "General Arbitration" and the parties to the arbitration and the number of the case is set out; the body of the notice simply reads :

"I beg to give notice that the above arbitration will take place here at 4 p. m. on Tuesday the 12th instant."

Nobody on the present petitioner's behalf in fact attended at the time and place in question, nor does it appear that anybody did so on behalf of the respondents. The arbitration took place at that time and place and the arbitrators made their award, which was c communicated to the parties by a letter of the following day the 13th. The award so far as is now material reads as follows :

"We the undersigned, having been duly constituted by the Registrar, Tribunal of Arbitration, Bengal Chamber of Commerce, as the Court to adjudicate on a dispute between Messrs. Ganpatrai & Sons Ltd., buyers, and Messrs. Chandrabhan Surajbhan, sellers, regarding a claim made by the former on the latter in respect of 50,000 yds. hessian cloth under Messrs. Chandrabhan Surajbhan's contract No. 2-3824 dated 1st October 1941, have taken upon ourselves the duties of arbitrators, read and carefully considered the papers in the case, and hereby decide and award as follows :

(1) That Messrs. Chandrabhan Surajbhan shall pay to Messrs. Ganpatrai & Sons Ltd., in full settlement d of their claim herein the sum of Rs. 15,765-13-0 together with interest thereon at the rate of 5 per cent. per annum from 24th October 1941 until the date of this award."

In due course the award was filed in this Court, and on 4th June notice that it had been filed was served on the present applicants as a firm but the notice was less than a thirty days notice. A fresh notice was served on each of them as individuals on the 17th of that month, and on the 16th of last month the present proceedings were commenced by the applicants to set the award aside.

A preliminary point has been taken (though it was not dealt with as a preliminary point it really in effect is one), viz., that the present application is time-barred as being made outside the thirty days from the service of

notice of the filing of the award. The answer e taken to it by Mr. P. C. Ghose is that the notice served on his clients outside the thirty days, though it was a perfectly good notice of the fact that the award had been filed was a perfectly bad notice of the day on which the Court would proceed to give judgment on the award because it was too short, and he says, a notice of this kind is like a boiled-egg—it cannot be—partly good and partly bad, but if it is bad at all it is bad altogether. That is certainly so for example in the case of a notice by a landlord to his tenant to quit the tenant can disregard a notice if it is too short and if the landlord tries to amend it by a subsequent f notice purporting during its currency to add a further period to the former notice the tenant can ignore that too, because he is entitled to a single and proper notice. So I think this point is well founded and is an answer to the preliminary objection but the other, more interesting, questions remain.

The applicants take what really amount to three points first, that the arbitrators (in a purely technical sense, not one which involves the slightest stigma on their characters in any way) "misconducted themselves" by proceeding ex parte on inadequate grounds, thus depriving his clients of an opportunity of arguing g their case and/or adducing evidence. Secondly, he says that there were questions in dispute which could only have been decided by taking oral evidence, and that they must have acted on no admissible evidence. Thirdly, he contends, that, read with the documents corresponding to pleadings, the award is bad on the face of it as not dealing with all matters in dispute.

I think it will be convenient to deal with these points in the reverse order. As to the last point, the applicants before me had set up a set-off or counter claim which I think must have been intended only to go in re. h reduction of the amount claimed by a sum of Rs. 1068 odd, and they definitely claimed that if any sum were awarded against them they were entitled to have back their delivery order. It does not appear on the face of the award that the arbitrators had considered these contentions, and it is noticeable that the difference between what they awarded and the amount claimed by the present respondents is exactly thirteen annas, for which difference no explanation has been offered to me at all. But the award does recite that they had carefully considered all the documents submitted to them and in the absence of any evidence to suggest in the least that that is not true, I must assume and I do, that they had care-

a fully considered all the documents submitted to them. They therefore considered these points raised by the present applicants and, rightly or wrongly, thought that there was no substance in them. I have no doubt that they did think all. I am not for a moment saying whether their decision is right or wrong. I should not express any opinion on the merits of the question, because they were parties' selected tribunal. Reading the recitals in the award with the body of the award itself and the parties' written contentions it must be taken that they had considered this matter suggested by the present applicants and b thought, as I say, there was nothing in it. My attention has been called to a case cited in Russell at p. 203 (Edn. 13) in (1842) 2 Dowl. (N.S.) 122¹ which on the face of it is strong in the applicants' favour. The note in Russell reads as follows :

"When all matters in difference, as well as the cause, are referred and the arbitrator find for the defendant on the general issue in debt, the award may be set aside for failing further to ascertain the amount of the defendant's set off."

c It will be seen that this was decided before even the Common Law Procedure Act, in 1842, in the days of strict pleading and on a reference in a suit and not merely of matters that had arisen in a dispute between the parties outside the Court. It is evident that the decision proceeded largely on the then technicalities of pleading and I do not feel bound to import into this country a decision founded on technicalities outgrown even in England at the present day. I think the reasonable construction of the award here is that the arbitrators did take these matters into account and thought nothing of them.

The second point raises the interesting question whether the arbitrators were bound to act on what is strictly admissible evidence. It is quite evident that they did not do so, d because, for example, their knowledge of the matters in dispute in so far as they were left in controversy by the written submissions of the parties could have been derived, in substance, only from their knowledge of arbitrations between other people, and Mr. Ghose presses upon me a number of English decisions in which it has been clearly laid down that arbitrators must at least try to apply the laws of evidence properly. I do not know that if an arbitrator makes an honest mistake as to what the law of evidence is that, in itself, is necessarily a ground for setting aside his award, because any tribunal may make a mistake as to law and the arbitrator (like the

¹ (1842) 2 Dowl. (N.S.) 122 : 4 Man & G. 647 : 12 L. J. C. P. 92 : 61 R. R. 636, *Maloney v. Stockley*.

civil Court whose decision it is sought to get revised) has jurisdiction to decide wrong as well as to decide right. But if it is shown that the arbitrator knowing, for example, that "what the soldier said is not evidence" were to say "I am not going to be bothered with technicalities of that sort and I am going to decide on what the soldier said" then no doubt, in England, he would be misconducting himself, and the award would be voidable. But the position here (as I think Mr. Banerjee is right in saying) is different because of S. 1, Evidence Act. This Act purports to be a complete codification of the law of evidence and by S. 1 it is expressly said not to apply to arbitrations. This can only mean, to my mind f that the arbitrators are not bound by those strict rules which are applicable to Courts of law. Indeed, Mr. Ghose agrees that it is so; but he says, they must observe the principle, if not the letter, of those rules, and not decide on questions of fact by the spin of a coin unless the parties agree that they should be decided in that manner. I think the real question here as in the case of the first point, is whether they have adopted any means of deciding the case which is contrary to natural justice. The question of what is "contrary to natural justice" has arisen very often, not g only in connexion with arbitrations, but also in connexion, for example, with cases in which the committee of a club seeks to expel a member for misconduct, or an executive body has been given, as by statute now-a-days it frequently has, power to act as judge in its own cause. It is certainly not contrary to natural justice to act on materials on which ordinary and reasonable people would naturally act. And ordinary and sensible people do constantly act and decide important matters in their own lives on materials hopelessly inadmissible in a Court of law. For example, h I imagine, that most people, if such a question should arise in their private lives, would regard it as some evidence that a testator was mad if he was proved to have been habitually followed about the place by small boys throwing stones and shouting "Silly Jack;" and would regard it as some evidence that a ship was seaworthy, if it was proved that her experienced captain made a thorough examination of her from truck to keel soon before putting to sea in her, even if he and the ship subsequently perished. Baron Parke himself however pointed out that neither of these things is any evidence at all as proving the fact of insanity or that of seaworthiness. In this case the arbitration proceedings between other parties were not strictly evidence, or indeed at all evi-

a dence, as between the disputants. But I think the tribunal was not strictly bound by the law of evidence, and was not acting unreasonably in regarding them as some indication of what in fact had taken place.

The next point raises a wide question to which I have already alluded, that of acting "in accordance with natural justice." I think I am right in saying that old cases in regard to club committees went so far as to decide that the committee could not expel a member for alleged misconduct without giving him an opportunity of appearing before them physically, either in person or if he desired by legal advisers but the House of Lords once before the last war and once during the war had to consider what was in substance the same question in two cases, (1911) A. C. 179² and (1915) A. C. 120.³

In the first case the Lord Chancellor stated his view of the propriety of the procedure adopted by the board of education and said that in such a case the board of education would have to ascertain the law and also to ascertain the facts that in doing so either they must act in good faith and listen fairly to both sides, for that is a duty laid upon any one who desires anything but he said :

c "I do not think they are bound to treat such a question as though it were a trial. They had no power to administer on oath and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who were parties to the controversy to correct or contradict any relevant statement prejudicial to their view."

a In the latter case, in which the respondent, Mr. Arlidge objected to a proposal by a local authority to demolish a considerable number of his houses, it was held that an appellant against the decision to demolish his house to the Local Government Board was not entitled as of right, as a condition precedent to the dismissal of his appeal, either (a) to be heard orally before the deciding officer, or (b) to see the report made by the Board's Inspector upon the public local enquiry. They had to have a local enquiry before they would pull down other people's houses, but having done that no one had a right to appear before them either in person or by an advocate or otherwise, but only a right to make written representations. Lord Shaw at page 138 said this : "The words 'natural justice' occur in arguments and sometimes in judicial pronouncements in such cases.

2. (1911) 1911 A. C. 179 : 80 L. J. K. B. 796 : 104 L. T. 689 : 75 J. P. 393 : 9 L. G. R. 652 : 27 T. L. R. 378 : 55 S. J. 440, Board of Education v. Rice.
3. (1915) 1915 A. C. 120 : 84 L. J. K. B. 72 : 111 L. T. 905 : 79 J. P. 97 : 12 L. G. R. 1109 : 30 T. L. R. 672, Local Government Board v. Arlidge.

My Lords, when a Central Administrative Board deals with an appeal from a local authority it must do its best to act justly, and to reach just ends by just means. If a statute prescribes the means it must employ them. If it is left without express guidance it must still act honestly and by honest means. In regard to these certain ways and methods of judicial procedure may very likely be imitated; and lawyer-like methods may find especial favour from lawyers. But that the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation. And the assumption that the methods of natural justice are ex necessitate those of Courts of justice is wholly unfounded. This is expressly applicable to steps of procedure or forms of pleading. In so far as the term "natural justice" means that a result or process should be just, it is a harmless though it may be a high-sounding expression; in so far as it attempts to reflect the old *jus naturale* it is a confused and unwarranted transfer into the ethical sphere of a term employed for other distinctions; and, in so far as it is resorted to for other purposes, it is vacuous."

Just as a statutory tribunal must follow its statutory procedure (if any) right or wrong, so all decisions as to the course to be adopted in general by a contractual tribunal must be read as subject to that course if any which the parties to the dispute in a particular case have agreed that their tribunal shall adopt. Subject to this, according to the high authority of Lord Shaw, the rule about "natural justice" only really, means that a tribunal which is to apply "natural justice" must act honestly and impartially.

In this case the parties, it seems to me, have contracted away any right to appear by advocate under the rules, and any right to appear in person unless the tribunal says "you appear in person and we will make a formal hearing of it," and it is rightly said by Mr. Banerjee that it is incorrect to say that the arbitrators proceeded ex parte at all. They did not. They proceeded according to the normal procedure that the rules, incorporated by the parties into their contract, contemplated, unless it is to be held that the notice of 8th May must be read as a notice of a formal hearing. I do not think that is its true construction. It headed "General Arbitration." It merely informs them that the arbitration will take place at a particular place and at a particular time. It does not say "you are required to attend, you must bring your witnesses" or anything of that sort. I quite agree with Mr. Ghose that, if it is correct that it is not an intimation of a formal information, it becomes, very nearly, a useless document. But though it may serve no useful purpose I think it was reasonable and an act of courtesy to the disputing parties to tell them what was happening that a decision was going to be made on their dispute at

a a particular place and particular time, and, at any rate, that the Bengal Chamber of Commerce were not sleeping over the matter but were doing something about it. If that is so, the applicants had no right to be present and were not deprived of anything to which they were entitled.

A minor point has been taken about it namely that they were away at the time, and consequently could not have attended. But nothing turns on that, if it is once decided that this was not a notice of a formal hearing, and moreover, it is covered by R. 20. If this notice was given 3 or 4 days before the time the arbitration was to take place at a particular place, namely their place of business in Calcutta, and the arbitration also was to take place in Calcutta, it was in fact a perfectly sufficient notice which distinguishes at least one case cited to me in which the notice in fact reached the person concerned about an hour before the time that the arbitration took place. That being the position though I am indebted to learned counsel for drawing my attention to a number of cases bearing on the question, I do not think it necessary to go through them all but I am obliged for their interesting and helpful arguments. The petition in my opinion fails and must be dismissed with costs.

R.K.

Petition dismissed.

* A. I. R. (31) 1944 Calcutta 132

BISWAS J.

Digendra Kumar Roy Choudhury and others — Plaintiffs — Appellants

v.

Kuti Mian, Defendant and another — Respondents.

Appeal No. 1740 of 1939, Decided on 20th April 1943, from appellate decree of District Judge, Bakarganj at Barisal, D/- 20th September 1939.

d * (a) Death—Common disaster—Death of several persons — There is no presumption of law as to survivorship—Evidence not establishing survivorship of any—Burden of proof is determining factor.

There is no presumption of law arising from age or sex as to survivorship among persons whose death was occasioned by one and the same cause, e. g., common boat disaster; nor is there any presumption that all died at the same time. The question is one of fact depending wholly on evidence, and if the evidence does not establish the survivorship of any one, the law will treat it as a matter incapable of being determined and the determining factor should be the rule regarding the burden of proof : (1860) 8 H.L.C. 183 and (1851-57) 4 De. G. M. & G. 633, *Rel. on; Case law discussed.* [P 134b,c,g,h]

C. P. C.—

('44) Chitaley, S. 100, N. 28 Pt. 3.

(b) Landlord and tenant — Ejectment — Suit for, by landlords—Onus is on plaintiffs to prove

title — They must prove that they represented whole of 16 annas landlord's interest.

In a suit for ejectment it is for the plaintiff to prove his title. Accordingly where the landlords-plaintiffs seek to eject a tenant from their holding the plaintiffs must establish affirmatively that the whole of the 16 annas landlord's interest was represented by them because there cannot be a lawful eviction of a tenant so as to cause a determination of the tenancy unless all the landlords join in it.

[P 135a,d]

T. P. Act—

('43) Chitaley, S. 106, N. 34.

('36) Mulla, Page 590 Pts. (b) and (c).

Atul Chandra Gupta and Surendra Nath Das Gupta — for Appellants.

Jitendra Nath Guha — for Respondents.

Judgment. — This is an appeal on behalf of the plaintiffs in a suit for recovery of possession on the disputed lands on evicting the defendants therefrom. The suit was decreed by the Munsif of Barisal, but dismissed on appeal by the learned District Judge. Hence the present appeal to this Court. The plaintiffs claim to be 16 annas landlords and their case briefly is that they had let certain lands to one Abdul Aziz Munshi and that the latter in his turn sub-let a portion to the defendants. In 1937, the plaintiffs evicted their lessee, the said Abdul Aziz Munshi, from the holding, but the defendants refused to vacate the portion of which they were in occupation. The plaintiffs served on them a notice to quit on 5th May 1938, but, without any result, and then commenced the present action on 22nd September, following.

The defence in substance is a denial of the plaintiffs' title to the full 16 annas of the landlords' interest. It is admitted that plaintiff 1 holds 12 annas 6 pies share. But the dispute is as regards the remaining 3 annas 6 pies. Plaintiff 2 claims to represent this interest as trustee to the estate of three brothers, called the D'Silvas, who between themselves are said to own it. But the defendants maintain that this leaves out of account the interest of another brother, E. C. N. D'Silva, who was admittedly one of the original co-owners of this share. This D'Silva was alive when Abdul Aziz Munshi was inducted into the land, but had died at the time of his eviction. He met with an accidental death in a boat disaster on 21st March 1935. According to the plaintiffs his interest passed, upon his death, to his three surviving brothers as his next of kin, in which case there can be no question that plaintiff 2, as trustee to their estate, would fully represent the said three annas six pies share. The defence case, however, is that the deceased was survived by his widow, who accordingly would and did take a share, and

a the widow's interest passed from her to her mother one Mrs. Wilcox, as her only heir under the law. Admittedly Mrs. Wilcox's interest was not represented by plaintiff 2; nor she was a party to the present suit; neither, it may be added, had she been a party to the eviction of Abdul Aziz Munshi. On these facts, the defendants seek to resist the plaintiffs' claim to khas possession on the following grounds : (i) that all the landlords not having joined in evicting Abdul Aziz Munshi, his tenancy could not be lawfully determined and the plaintiffs were accordingly not entitled to re-enter; (ii) that this being an action in ejectment, as all the landlords were not parties to it, the suit was bound to fail.

It will thus be seen that the main question on which the case turns is whether or not Mr. E. C. N. D'Silva was survived by his widow. This is a question of fact, but its determination is rendered difficult by the circumstance that both husband and wife are said to have perished in the same boat disaster, and there is no direct evidence on either side as to the precise sequence in which the deaths took place. There is some evidence on behalf of the plaintiffs regarding the circumstances in which the accident took place, but c for the rest, the evidence of both parties is confined to the question of the comparative age and state of health of the couple. There is also evidence given by the plaintiffs to show that though after the death of the unfortunate pair, Mrs. Wilcox filed an application of Letters of Administration to the estate of her daughter, she limited her claim only to the ornaments and personal effects of the deceased and laid no claim to any immovable property.

On this state of the evidence, the learned Munsif was inclined to think that Mrs. D'Silva d must have pre-deceased her husband and actually recorded a finding to the effect. In that view, he held that Mrs. D'Silva's mother had not acquired any share in the estate left by Mr. E. C. N. D'Silva. On appeal, the learned District Judge, after pointing out the lack of direct evidence on the question in issue, went on to say that such evidence as there was on the record did not enable the Court to come to any definite conclusion. He was accordingly of opinion that the matter was to be treated as one which was "incapable of being determined", and the ultimate decision would consequently have to be governed by the incidence of the burden of proof. According to the learned Judge, the burden in this case lay on the plaintiffs, this being action in

ejectment, and as he held that this burden had not been discharged, he dismissed the suit.

The question of survivorship in a common disaster was a source of perplexity to Courts in England until 1925, when for the first time the matter was sought to be placed on a statutory basis by S. 184, Law of Property Act, 1925. That section is in these terms :

"In all cases where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the Court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder."

If this statutory presumption could be f applied in the present case, Mrs. D'Silva must, of course, be deemed to have survived her husband, and this would lend support to the defendants' case. It is obvious, however, that the provision of the English Law of Property Act cannot be invoked in this country, and we are accordingly left to decide the question without the aid of any statute. It is not necessary to refer to all the earlier cases in England from which no uniform principle can be deduced. It has sometimes been held that in the absence of direct evidence the Court ought to presume simultaneous death, and it has again been held that the presumption g ought to be in favour of survivorship of the younger one. Thus, in the case in (1793) 91 E. R. 497,¹ Sir W. Wynne observed :

"With respect to the priority of death, it has always appeared to me more fair and reasonable in these unhappy cases to consider all the parties as dying at the same instant of time, than to resort to any fanciful supposition of survivorship on account of the degrees of robustness."

In another case, (1838) 163 E. R. 246,² where husband and wife were drowned by the same accident, it was held that the presumption was that they died at the same time. On the other hand, it was pointed out by Sir John Nicholl in the case in (1815) 161 E. R. 1137,³ h that there was nothing to take away the ordinary presumption that a man was likely to survive a woman in a struggle in a case of this description. Then followed, in 1860, the decision of the House of Lords in (1860) 8 H. L. C. 183; also 11 E. R. 397;⁴ affirming (1851-57) 4 De. G. M. & G. 633⁵ which has in

1. (1793) 91 E. R. 497, *Wright v. Netherwood*.

2. (1838) 163 E. R. 246: 1 Curt. 705, *Satterthwaite v. Powell*.

3. (1815) 161 E. R. 1137: 2 Phill. Ecc. 261, *Taylor v. Diplock*.

4. (1860) 8 H. L. C. 183: 30 L. J. Ch. 65: 125 R. R. 99: 11 E. R. 397, *Wing v. Angrave*.

5. (1851-57) 4 De. G. M. & G. 633: 3 Eq. R. 794: 24 L. J. Ch. 293: 1 Jur. (N. S.) 159: 43 E. R. 655: 2 W. R. 641, *S. C. sub nom. Underwood v. Wing*.

a fact, been regarded as the leading case on the subject. In this case, two persons, husband and wife, made their separate wills. In the husband's will, the property was given to his wife, "and in case my wife shall die in my life time", then to W. in trust for the children on their coming of age, and in case all of them should die under age, then to W. for his absolute use and benefit. In the wife's will, made under a power given by her deceased father, in default of the exercise of which the property was to go to relatives specifically named, the property was given to the husband, subject to interests in the children, "and in case my husband should die in my life time", then to W. absolutely. The husband and wife and two children perished at sea, being all swept off the deck by one wave and all disappearing together. It was held that there was no presumption of law arising from age or sex as to survivorship among persons whose death was occasioned by one and the same cause; nor was there any presumption that all died at the same time. The question is one of fact depending wholly on evidence, and if the evidence does not establish the survivorship of any one, the law will treat it as a matter incapable of being determined, the onus of proof being on the person asserting the affirmative. According to English law, therefore, it will be seen that there is no room for the application of any presumption, either of survivorship or of contemporaneous death. From first to last, the question is regarded as a pure question of fact, and the burden of proof of survival, or concurrent decease, or predecease lies solely on the party who asserts the fact. In India, the decisions have not been uniform. In the Bombay case in 47 Bom. 37⁶ at p. 41, Macleod C. J. observed as follows:

c " therefore, when the evidence on the question who died first is so evenly balanced, I think we are entitled to say that the probabilities are in favour of the younger man surviving the elder."

d On the other hand, there is a decision of the Chief Court of Oudh reported in 9 Luck. 461,⁷ in which Nanavutty J. on a consideration of the case law both in England and India, laid down the rule much on the lines of the leading English case in (1860) 8 H. L. C. 183.⁴ It seems to me, having given the matter my best consideration, that the safest rule, to follow will be that laid down in the House of Lords' decision, so long as there is no express

provision by statute in this country, corresponding to S. 184, Law of Property Act, 1925. The presumption of death taking place at the same moment is so patently opposed to probabilities that the Court might well hesitate to act upon such a basis. As Bennett J. said in a recent case, 1942 Ch. 377=(1942) 2 ALL. E. R. 46,⁸ where for the first time the effect of S. 184, Law of Property Act, came to be considered:

"Time being infinitely divisible, the fact of two persons dying at exactly the same moment of time is so highly improbable that the evidence relied upon to prove it must be looked at closely and critically."

The matter had been put even more clearly by Lord Cranworth L. C. in (1855) 4 De. G.M. & G. 633,⁵ afterwards affirmed by the House of Lords in (1860) 8 H.L.C. 183⁴ (supra):

"It cannot be assumed to be proved or probable or possible that two human beings should cease to breathe at the same moment of time, for that is hardly within the range of imagination, and to adjudicate on such a principle would, I think, be to proceed on false data."

The other presumption, that of survivorship, based on the age or sex or state of health of the parties might no less be no more than a purely artificial or arbitrary rule, and therefore, only an equally conjectural basis for ascertaining the truth. On these grounds, as I have said, it would certainly be better to treat the question as one of fact to be disposed of on the evidence. If the evidence is sufficient to support a finding of survivorship, well and good, but where evidence is lacking or the evidence establishes a perfect equipoise, the determining factor should be the rule regarding the burden of proof. In the present case, the learned District Judge, although he has not referred to the case law on the subject, seems to me all the same to have applied the correct principle. He has held that the evidence in this case did not establish the survivorship of either the husband or the wife, and the matter was accordingly to be treated as one incapable of being determined.

The question arises on whom, in these circumstances, the burden of proof lay, whether on the plaintiffs who asserted that Mrs. D'Silva had predeceased her husband, or on the defendants whose case was that Mr. D'Silva had predeceased his wife. In one sense, either party was asserting an affirmative and would accordingly be bound to prove its case. The learned Munsif took the view that as the defendants here were claiming on the basis of Mrs. D'Silva's survivorship, the onus was on

6. (22) 9 A. I. R. 1922 Bom. 347 : 77 I. C. 117 : 47 Bom. 37 : 24 Bom. L. R. 836, Yeknath Narayan Kulkarni v. Laxmibai.

7. (34) 21 A. I. R. 1934 Oudh 101 : 148 I. C. 781 : 9 Luck. 461 : 11 O. W. N. 267, Mt. Neksi Kuar v. Mt. Jwala Kuar.

8. (1942) 1942 Ch. 377 : 111 L.J.Ch. 226 : 167 L.T. 235 : 58 T. L. R. 291 : 86 S. J. 242 : (1942) 2 ALL E. R. 46, Re Lindop, Lee-Barber v. Reynolds.

a them to prove such survivorship, but that they had practically adduced no evidence on the point. The learned District Judge, on the other hand was inclined to think that this might be the correct rule of evidence, if the suit was a title suit between the D'Silvas on one part and Mrs. Wilcox, on the other, but that was not the case here. This was a suit for ejectment, and it was accordingly for the plaintiffs to prove their title, which meant that they were called upon to show that the D'Silvas whom plaintiff 2 claimed to represent in the suit constituted the whole group of 3 annas 6 pies landlords. On the admitted b facts, this could not be established unless the late E. C. N. D'Silva had left only his brothers, and not his widow as well surviving him as his heirs. The plaintiffs had, however, failed to offer any direct evidence to show that Mrs. D'Silva had died before her husband, and such evidence as they had given regarding the age and state of health of the pair left the matter wholly inconclusive. I think, in the circumstances, the learned District Judge was right in the view he took regarding the burden of proof in this case, and it must accordingly be held that the plaintiffs failed to establish affirmatively that the whole c of the 16 annas landlord's interest was represented by them.

This takes us to the question as to whether this means that the suit must be dismissed in its entirety. Mr. Gupta, on behalf of the appellants, contended that in any case the plaintiffs were entitled to a decree for joint possession with the defendants to the extent of the share which they had succeeded in establishing. The initial difficulty however in accepting this contention is that if there was a fraction of the landlord's interest outstanding in Mrs. Wilcox at the date Abdul Aziz Munshi was evicted, there could have been no d valid determination of the tenancy. It was not a case of the plaintiffs, as cosharer landlords, acquiring the interest of their lessee, but it was a case of alleged eviction of the lessee from the holding. I think, it is well settled that there cannot be a lawful eviction of a tenant so as to cause a determination of the tenancy unless all the landlords join in it. As on the findings that cannot be said to have been established here, it must follow that Abdul Aziz Munshi's interest in the tenancy still subsisted, notwithstanding the alleged eviction, and in that case the defendants, as sub-lessees, would be fully protected. The result, in my opinion, therefore, is that the judgment and decree of the learned District Judge must be affirmed, and this appeal dis-

missed with costs. Leave to appeal under a cl. 15, Letters Patent, is granted.

G.N.

Appeal dismissed.

* A. I. R. (31) 1944 Calcutta 135

B. K. MUKHERJEA AND BISWAS JJ.

Superintendent, R. M. S. (C) Division, Calcutta

v.

R. M. S. (C) Division Co-operative Credit Society, Ltd., Howrah.

Civil Rule No. 1119 of 1943, Decided on 11th January 1944, for setting aside order of Munsif Third Court, Howrah, D/- 6th April 1943. f

(a) Civil P. C. (1908), O. 21, R. 48—Disbursing officer has locus standi to apply to Court showing that order issued to him is illegal.

A disbursing officer no doubt is only empowered to act in the way indicated in O. 21, R. 48, sub-r. (2) still he is a person affected by the order of the Court; for the direction of the Court is sent to him, and under sub-r. (3) of O. 21, R. 48, he can be made personally liable if he pays any sum in contravention of such directions. He therefore has a right to apply to the Court and bring to its notice that the order which he is asked to obey is illegal or prohibited by statute: ('38) 25 A. I. R. 1938 Cal. 111 and ('41) 28 A. I. R. 1941 Bom. 389, *Rel. on.* [P 136h; P 137a] g

C. P. C. —

('44) Chitaley, O. 21, R. 48, N. 1, Pt. 11.

* (b) Civil P. C. (1908), S. 60 (1) (i) (k) — Attachable portion of salary — No exemption can be claimed in regard to any part of such portion on the ground of its being required as contribution for Provident Fund.

Clause (k) is independent of cl. (i). But the exemption under cl. (k) cannot apply unless and until the money has actually been deposited in the Provident Fund. Hence, where the attachable portion of a person's salary is sought to be attached under cl. (i), no exemption can be claimed in regard to any part of such portion under cl. (k) on the ground of its being required as a contribution to the Provident Fund. Such contribution can be recovered from the unattachable portion of the salary: ('40) 27 A. I. R. 1940 Mad. 766, *Ref.* [P 137b,c,d; P 138c,d] h

C. P. C. —

('44) Chitaley, S. 60, N. 19 Pt. (9).

('41) Mulla, Pages 245, 246.

(c) Civil P. C. (1908), S. 60 (k) — Compulsory deposit — Optional subscriber — His deposit is compulsory within cl. (k) (*Obiter*).

Even an optional subscriber cannot demand repayment of his deposit at his option, and consequently such deposit also may be regarded as a compulsory deposit within the meaning of S. 60 (k). [P 137h]

C. P. C. —

('44) Chitaley, S. 60, N. 19.

('41) Mulla, Page 246.

Ramaprosad Mukherji — for Petitioner.

Apurbadhan Mukherji — for Opposite Party.

B. K. Mukherjea J.—The material facts involved in this case are not in controversy and may be shortly stated as follows: One Khudiram Mukherji who was an employee in the R. M. S. (C) Division of the Postal Department had borrowed a certain sum of money from the opposite party No. 1 which is a Co-operative Credit Society of the R. M. S. Division. The opposite parties Nos. 2 and 3 who are also sorters in the same Department stood sureties for the debt. Khudiram died without satisfying his debt, and after his death the opposite party No. 1 obtained an award against the two sureties under the provisions of the Co-operative Credit Societies Act for a sum of about Rs. 240. The award was put into execution in execution case No. 167 of 1941 of the Court of the Third Munsif at Howrah. The creditor prayed for realisation of the money due on the award by attachment of the salaries of the two judgment-debtors. On 13th September 1941, the executing Court ordered attachment to issue under O. 21, R. 48, Civil P. C., and directed the postal department of the Government to withhold and remit to the Court a sum of Rupees 15 every month from the salary of opposite party No. 2 and a sum of Rs. 12-8-0 a month from the salary of opposite party No. 3 till the decretal dues were satisfied. The Court proceeded on the view that as the salary enjoyed by opposite party No. 2 was Rs. 130 a month, the first Rs. 100 of the salary as well as half of the remainder aggregating to Rs. 115 was exempt from attachment under S. 60 (i), Civil P. C., and the balance amounting to Rs. 15 only was available for payment to the creditor. Similarly, with regard to opposite party No. 3 whose pay at that time was Rs. 125 a month, a sum of Rs. 12-8-0 was attachable under O. 21, R. 48, Civil P. C., the rest being immune from attachment under S. 60 (i), Civil P. C., as mentioned above. Upon this attachment order being issued the petitioner in this rule who is the disbursing officer in the R. M. S. (C) Division represented to the Court by letters that there was difficulty in the way of complying with its directions inasmuch as opposite party No. 2 had been contributing Rs. 22 a month out of his salary to the General Provident Fund and Defence Savings Provident Fund, and the monthly subscription of opposite party No. 3 to these funds amounted to Rs. 12 a month. It was pointed out that these were compulsory deposits to which the provisions of the Provident Funds Act (1925) were applicable and consequently they were exempt from attachment under S. 60 (k), Civil P. C. On receipt of these letters the learned Munsif

intimated to the Post Master General, Bihar and Orissa Circle, that if the postal authorities wanted to challenge the propriety of the Court's order, they should put in objections formally through a lawyer. Thereupon two applications were filed by the petitioner objecting to the attachment order made by the Court. The objections raised were of a two-fold character: It was contended in the first place that the Court had no local jurisdiction to entertain the execution case and issue the attachment order. The second point taken was that the contributions to the provident fund were not attachable under the Code of Civil Procedure. The learned Munsif by his order dated 6th April 1943, dismissed these applications. It is against this order that the present rule has been obtained.

Mr. Rama Prosad Mukherji, who appeared in support of the rule has contended before us that cls. (i) and (k) of S. 60, Civil P. C., should be read separately and that the Legislature intended to exempt not only the salary of a public officer upto Rs. 100 and half of the remainder, but also independently of that, such amount as is compulsorily deducted from the salary of the officer as contribution to the provident fund. It is said that so far as opposite party 2 is concerned, he is entitled to immunity from attachment in respect of Rs. 115 under S. 60 (i), Civil P. C., and of a sum of Rs. 22 in addition to that under cl. (k) of the section and the result consequently is that nothing remains of his salary which is attachable under law. As regards opposite party 3, it is stated that the amount of his contribution to the general provident fund being Rs. 12 a month, a sum of Rs. 3 only would be available for attachment after allowing exemptions under cls. (i) and (k) of S. 60, Civil P. C.

Mr. Apurbadhan Mukherji who appeared for the Co-operative Society has argued on the other hand: (1) that the petitioner had no locus standi to intervene and file objections in the execution case; (2) that cl. (k) of S. 60, Civil P. C., affords no protection to the judgment-debtors in the present case, as it relates to deposits already made in the provident fund and not to contributions which might be made in future; and (3) that the judgment-debtors being optional subscribers to the provident fund, their contributions could not rank as compulsory deposits in law.

We may say that we felt some doubt at the outset as to whether the petitioner had any locus standi to appear in this execution proceeding and oppose the claims of the creditor. He is admittedly neither a judgment-debtor

a nor a garnishee, and as a disbursing officer the law only empowers him to act in the way indicated in O. 21, R. 48, sub-r. (2), Civil P. C., if the circumstances mentioned in that sub-rule are present. It seems, however, that in a sense he is a person affected by the order of the Court; for the direction of the Court was sent to him, and under sub-r. (3) of O. 21, R. 48, he can be made personally liable if he pays any sum in contravention of such directions. In these circumstances, his right to apply to the Court and bring to its notice that the order which he was asked to obey is illegal or prohibited by statute has been recognized in some cases and it has been held that the Court has inherent powers to consider such applications: *vide* the cases in I.L.R. (1938) 1 Cal. 433¹ and 43 Bom. L. R. 758.² We cannot say that these decisions are wrong and we are unable, therefore, to agree with the Court below that the petitioner had no locus standi to make these applications.

Coming now to the main point raised by the petitioner, we are of opinion that Mr. Rama Prosad Mukherji is not right in his contention that the attachment order made in this case offends against the provision of S. 60 (k), Civil P. C. It is true that cl. (k) of S. 60 is independent of cl. (i). In fact the two clauses relate to two distinct matters and have different objects in view. Clause (i) of S. 60 lays down the extent to which the salary of a public officer would be exempt from attachment, and the object undoubtedly is to enable the officer to have sufficient means to maintain himself and his family in a way suitable to his position. Clause (k) on the other hand, re-enacts the provisions of S. 3, Provident Funds Act (1925) and exempts from attachment all "compulsory deposits" in provident funds. The expression "compulsory deposit" is defined in S. 2 (a), Provident Funds Act as

"a subscription to or deposit in a provident fund which under the rules of the fund is not, until the happening of some specified contingencies repayable on demand otherwise than for the purpose etc etc."

This clearly indicates that there cannot be a compulsory deposit unless the money is actually deposited in or subscribed to a provident fund, for no question of re-payment can possibly arise unless the money is received by the authorities managing the fund. The

whole policy of the Provident Funds Act is to protect from attachment all deposits and subscriptions so long as they are in the hands of the fund authorities. As the exemption ceases as soon as the amount is paid out to the person entitled to it, so no exemption can attach to any portion of the salary of a public officer unless and until it actually reaches the fund. In the case before us no order has been made by the Court attaching the deposits of any of the judgment-debtors in the provident fund. What has been directed to be attached is that portion of the salary of each which is not exempt from attachment under cl. (i) of S. 60, Civil P. C. It may be that the judgment-debtors' contributions to the Provident Fund would now have to be made from the non-attachable portions of their salaries, but there is no law which requires that they should be paid only out of the attachable portion. Mr. Rama Prosad Mukherji has drawn our attention in this case to a decision of Horwill J. sitting singly in A.I.R. 1940 Mad. 766.³ There, it was held *inter alia* that cls. (i) and (k) of S. 60 should be taken separately, and to that portion of the salary which is not attachable under cl. (i) of S. 60 must be added the amount which is to be deducted from the salary of the officer as his contribution to the Provident Fund. It was rather assumed than decided that even a subscription not actually paid to the Provident Fund would rank as compulsory deposit, and this question was not considered by the Court at all.

The result, therefore, is that we are unable to hold that the attachment order made by the Court in the present case is illegal or contrary to law and should be set aside. So far as the disbursing officer is concerned, we do not think that there is any difficulty in his way. If the judgment-debtors do not choose to discontinue subscribing to the Provident Fund, then the officer would be perfectly justified in deducting their subscriptions from the portions of the salaries that have not been attached.

The third point raised by Mr. Apurba Dhan Mukherji and which seems to have been accepted by the Court below does not appear to us to be sound. The essence of a compulsory deposit as the definition, shows consists in the fact that it is not refundable except under the contingencies specified in the Act. Even an optional subscriber cannot demand repayment of his deposit at his option, and consequently

1. ('38) 25 A. I. R. 1938 Cal. 111 : 176 I. C. 449 : I. L. R. (1938) 1 Cal. 433 : 42 C. W. N. 206 : 70 C. L. J. 324, Calcutta Port Commissioners v. Bhuvaneshwar Prosad.

2. ('41) 28 A. I. R. 1941 Bom. 389 : 197 I. C. 462 : I. L. R. (1941) Bom. 415 : 43 Bom. L. R. 758, Post Master General of Bombay v. Chenmal Mayachand.

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3. ('40) 27 A. I. R. 1940 Mad. 766 : 191 I. C. 462 : (1940) 1 M. L. J. 936, Kondayya Nayudu v. Marianan.

a such deposit also may be regarded as a compulsory deposit within the meaning of S. 60 (k), Civil P. C. Having regard to the view which we have taken regarding the interpretation to be put upon the expression "compulsory deposit" in S. 60 (k), Civil P. C., it is not necessary for us to decide this question.

The result therefore is that the rule is discharged though not on the grounds put forward by the learned Munsif. We make no order as to costs.

Biswas J.—I agree. In my opinion, cl. (k) of S. 60, Civil P. C., which exempts from attachment "all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, 1925, for the time being applies in so far as they are declared by the said Act not to be liable to attachment or sale," does not mean that such portion of the salary of an employee as is required for the purpose of paying his Provident Fund contribution is rendered unattachable. So far as salary is concerned, cl. (i) indicates the portion which is made non-attachable. Clause (k) comes into operation only when the amount which is deducted from the salary on account of the Provident Fund is paid into the fund. It is then that it becomes a compulsory deposit in the fund. There is no question in the present case of the decree-holder seeking to attach any sums lying in deposit in the Provident Fund to the credit of the judgment-debtors. I am unable to accept Mr. Rama Prosad Mukherji's argument that the result of giving effect to the order of attachment will be to compel the petitioner to infringe the provisions of S. 60, Civil P. C., or of the Provident Funds Act or any rules made under the said Act. There is nothing to indicate that the amount necessary for deposit in the Provident Fund may not be recovered by the disbursing officer by reduction from the non-attachable portion of the salary, meaning by "non-attachable portion" that amount of the salary which will be left over after attachment of the portion liable to attachment under cl. (i).

R.K.

Rule discharged.

*** A. I. R. (31) 1944 Calcutta 138**

MITTER AND BLANK JJ.

Jamunadhar Poddar Firm — Plaintiff
— Appellants

v.

Jamunaram Bhakat and others —
Defendants — Respondents.

Appeal No. 61 of 1942, Decided on 16th December 1943, from original decree of Sub-Judge, Murshidabad, D/- 11th September 1941.

* Civil P. C. (1908), O. 30, Rr. 1 and 10—Hindu Joint family trading concern cannot sue in firm name but can be sued in firm or assumed name — Suit must however be in respect of matters connected with business carried in assumed name.

A Hindu joint family trading concern is not a firm. Such a Hindu joint family even when it carries on business under an assumed firm name cannot sue as plaintiff in the firm name under the provisions of O. 30, R. 1. The suit must be brought either by the Karta of the family or by all the members of the joint family who are coparceners. But it does not necessarily follow that a suit cannot be instituted against the members of a joint Hindu trading family in the assumed name in which they are carrying on business or that a decree obtained in that form would be a nullity. Order 30, R. 10 however enables a person to sue another as defendant in the assumed name. This distinction which has been made in O. 30 itself has been made in the interest of commerce. Order 30, R. 10 applies not only to a single individual carrying on business under a firm name or an assumed name but it also applies to a number of individuals carrying on business either under a firm name or an assumed name when those individuals do not in law constitute a partnership resting on contract. Such a defendant can however be sued in his firm name or in the assumed name in which he is carrying on business only in respect of matters which are connected with the business which he is carrying on under that name : ('36) 23 A.I.R. 1936 Mad. 707, *Dissent*; (1895) 2 Ch. 630, (1893) 2 Q. B. 96 and ('41) 28 A. I. R. 1941 Pat. 596, *Expl.*; *Case law discussed.* [P 140g,h; P 141a,e,f; P 143a,b]

C. P. C. —

('44) Chitaley, O. 30, R. 10, N. 1, Pt. 12.

('40) Mulla, Page 1013.

Bhola Nath Roy and Parimal Mukherjee —
for Appellants.

Amarendra Nath Bose, Kanaidhan Dutt and
Sudhansu Kumar De — for Respondents.

Judgment. — One Moti Bhagat, a person governed by the Mitakshara law, died leaving him surviving four sons, Motni alias Sew Gobind, Ram Kissen, Sree Kissen and Balgobind. Balgobind is dead and his sons, Jamunaram and Kanailal, are defendants 1 and 2 in the suit. The other three sons of Moti Bhagat are defendants 3 to 5. Sew Gobind's sons are defendants 6 to 11; Ram Kissen has no male descendant and Sree Kissen's sons are defendants 12 and 13. Jodhanprosad and Bhagwandas, who are defendants 8 and 9, are two of the sons of Sew Gobind. It is admitted by both sides that the aforesaid descendants of Moti Bhagat form a joint Hindu family governed by the Mitakshara law.

A business was carried on at Chāibassa and other places under the name and style of "Jodhanprosad Bhagwandas Firm." Whether that business was a joint family business of the descendants of Moti Bhagat or was a partnership business in which only some of the descendants of Moti Bhagat were interested is an important point in the case. That

a point will have to be decided on evidence at a later stage of this suit. As the suit has been dismissed on a preliminary issue by the learned Subordinate Judge on the basis that the business carried on under the name and style of "Jodhanprosad Bhagwandas Firm" was a joint family business we have to proceed on that footing also. For convenience we would use the expression "Jodhan Prosad Bhagwandas Firm" to designate the joint family business carried on under that assumed name.

The plaintiffs are partners of a firm carrying on business under the name and style of "Jamunadhar Poddar Firm." There were business dealings between them and "Jodhanprosad Bhagwandas Firm." For their dues on those business dealings they sued the "Firm of Jodhanprosad Bhagwandas" in the Court of the Deputy Commissioner at Chaibassa, and recovered a decree on 23rd December 1932, for Rs. 8691. That decree was affirmed on appeal by the Patna High Court. In that suit Jodhanprosad and Ram Kissen appeared as "Partners of the firm called Jodhanprosad Bhagwandas." That decree was transferred for execution to the District of Murshidabad and an execution case, being Money Execution Case No. 40 of 1937, was started in the Court of the Subordinate Judge of Berhampore against the "Firm Jodhanprosad Bhagwandas" and against Jodhanprosad and Ram Kissen personally following the procedure laid down in O. 21, R. 50, Civil P. C. A house in Dulan, which is the subject-matter of this suit, was attached and at the court sale which followed the decree-holders, who are the plaintiffs in this suit, purchased the same for Rs. 6000 on 1st October 1937. The sale was confirmed on 11th April 1938 and the writ for delivery of possession was issued on 12th April 1938 but no possession could be taken by the decree-holders purchasers for the reasons which we would presently notice. This house has been found to be joint family property of the descendants of Moti Bhagat, whom we have mentioned in first part of our judgment.

A firm called Heeralal Agarwalla & Co. had also obtained a decree against the "Firm Moti Bhagat Ram Kissen" and had purchased the self-same house at the court sale held in execution of its decree, but that purchase was in point of time later than the purchase of the plaintiffs. Thereafter, Jamunaram and Kanailal filed a title suit being No. 13 of 1938 of the Court of the Subordinate Judge at Berhampore, against Heeralal Agarwalla and Co. and the plaintiffs and another person. The remaining male descendants of Moti Bhagat were made pro forma defendants. In

that suit they prayed for a declaration that their interest in the house had not been affected by any one of the two execution sales. The plaint has not been exhibited in this case but from what is stated in the recital of the decree of the trial Court, their case was that the house in question was joint family property, that the "Firm Jodhan Prosad Bhagwandas" was not a joint family business but a partnership concern, of which Ram Kissen and Jodhanprosad only were partners, that accordingly the decree obtained by Heeralal Agarwalla and Co. and the plaintiffs (Jamunadhar Poddar Firm) did not bind them and consequently the execution sales did not affect their interest in the house. The learned Subordinate Judge dismissed the suit by his judgment and decree dated 24th April 1939, and his decree was confirmed on appeal by the learned District Judge on 4th July 1939. On second appeal (No. 1239 of 1939) the suit was decreed by a Division Bench of this Court on 5th July 1940 (Ex. 2).

After this judgment Heeralal Agarwalla and Co. disappeared from the scene but Jamunadhar Poddar Firm, instituted the suit, in which this appeal arises, in the Court of the Subordinate Judge at Berhampore on 19th August 1940. The defendants to the suit are the male descendants of Moti Bhagat, who are all the coparceners of the undivided Hindu joint family. We have mentioned them in the earlier part of our judgment. In the plaint they admit that the house in question belong to all the defendants. They state their case in alternative forms. Their first case is that the joint family had carried on business under the name of "Jodhanprosad Bhagwandas Firm," and that Jodhan Prosad and Ram Kissen were the accredited agents of the joint family. Consequently, they had acquired sixteen annas title to the house by reason of their purchase at the court sale in Money Execution Case No. 40 of 1937, even if the house is the joint family property of the defendants. Their alternative case is that the defendants as members of the joint family were "partners of the firm of Jodhanprosad Bhagwandas and that all the interest of the members of the joint family had passed to the plaintiffs by the said court sale." Two sets of written statements were filed—one by defendants 4, 8 and 14 and the other by the remaining defendants. On the pleadings ten issues were framed. Issue 1 runs thus: "Is the suit maintainable in the present form." Issue 5 runs thus: "Is the suit barred by res judicata." The remaining issues need not be noticed at this stage. The learned Subordi-

a nate Judge took up for consideration issue 1 only as a preliminary issue. Issue 5 which could also have been taken into consideration at that stage of the hearing was kept reserved. The learned Subordinate Judge decided issue 1 only, and that against the plaintiffs, and dismissed the suit. In the course of his judgment he has, however, put a certain construction on the judgment of the Division Bench delivered in Second Appeal No. 1239 of 1939.* As we are of opinion that issue 1 has been wrongly decided by the learned Subordinate Judge and that accordingly the case has to be remanded for a decision on the other material

b issues, including issue 5 (issue of res judicata) we think it proper to expunge everything from the judgment of the learned Subordinate Judge which concerns the construction of that judgment, in order that none of the parties may be prejudiced when the issue of res judicata is taken up for consideration. That issue could not be considered by us, for the pleadings of Title Suit No. 13 of 1938 are not on the record. Those pleadings would be very material for deciding the question of res judicata, and the judgment of the Division Bench of this Court may have to be construed in the light of those pleadings.

c As the learned Subordinate Judge has decided issue 1 as an issue in bar he was quite right in saying that at that stage the averments of the plaintiffs as contained in their plaint must be assumed to be true. The material statements as made in the plaint for the purpose of deciding issue 1 may be summarised thus : (1) that defendants 1 to 13, (the male descendants of Moti Bhagat) are the coparceners of a joint Hindu family; (2) that the said joint family traded under the name and style of "Jodhanprosad Bhagwandas Firm;" (3) that the decree which the plaintiffs had obtained against "Jodhanprosad Bhag-

d wandas Firm," was in respect of a debt of the joint family business; (4) that Jodhanprosad and Ram Kissen, two of the coparceners of the joint Hindu family, were the accredited agents of the joint family for conducting the said joint family business; and (5) that the house in suit (Dhulian house) is the property of the said joint family.

On an assumption that these facts are true, the learned Subordinate Judge has come to the conclusion that the suit is not maintainable. His reasons are as follows : (1) that members of a joint family who are owners of a joint family business are not partners. They cannot therefore file a suit under the procedure laid down in O. 30, Civil P. C.

* See (27) A. I. R. 1940 Cal. 515.

For this proposition he has relied upon 61 Cal. 975;¹ (2) that the provisions of O. 30 do not apply to a "joint family firm" and that such a firm cannot sue or be sued except in the names of its members. For this proposition he has relied upon the decision of the Bombay High Court in 35 Bom.L.R. 569.² This case, however, is no authority for the proposition that a joint family cannot be sued as defendant in the firm name in which it traded. From those two propositions he came to the conclusion that

"the plaintiff's decree in the Chaibassa suit was against a firm which had no legal existence in the eye of law, it being neither a corporation, nor a firm of partners, governed by any contract between them." f

He further observed thus :

"That being so, the decree in the Chaibassa Court was a decree against a non-existent person, and hence it was a nullity and the execution case following from it including the sale of the disputed house property at Dhulian are all null and void and of no effect whatsoever."

He accordingly held that the suit was not maintainable.

We may at the outset observe that the learned Subordinate Judge failed to notice an important provision of law, namely O. 30, R. 10, Civil P. C. That feature is also present in the judgment of the Division Bench delivered in Second Appeal No. 1239 of 1939, but g we refrain from making any further comment on that judgment, for the reason that any expression of opinion by us concerning that judgment or its real import may prejudice the parties on the question of res judicata and other material points in the case. In our judgment O. 30, R. 10 is a very important provision and issue 1,—whether the suit is maintainable—would depend upon the construction of that rule.

It is settled law that a Hindu joint family trading concern is not a firm. It is also settled law, at least so far as this Court is concerned, that a Hindu joint family even h when it carries on business under an assumed firm name cannot sue as plaintiff in the firm name under the provisions of O. 30, R. 1, (61 Cal. 975;¹ A. I. R. 1938 Pat. 270;³ A. I. R. 1938 Lah. 563⁴). The suit must be brought either by the karta of the family or by all the members of the joint family who are coparceners. But it does not necessarily follow that

1. ('34) 21 A. I. R. 1934 Cal. 810 : 152 I. C. 991 : 61 Cal. 975 : 38 C.W.N. 914, Lal Chand Amonlal v. M. C. Boid & Co.

2. ('33) 20 A. I. R. 1933 Bom. 304 : 147 I. C. 786 : 35 Bom. L. R. 569, Amulakchand v. Babulal.

3. ('38) 25 A. I. R. 1938 Pat. 270 : 175 I. C. 655 : 19 P. L. T. 686, Lakhan Sao v. Firm Kaniram Bhagwandas.

4. ('38) 25 A. I. R. 1938 Lah. 563 : 177 I. C. 918 : 40 P. L. R. 456, Devi Sahai v. Gillu Mull.

a a suit cannot be instituted against the members of a joint Hindu trading family in the assumed name in which they are carrying on business or that a decree obtained in that form would be a nullity. To such a case different considerations may apply. A single individual who carries on business under a firm name or an assumed name cannot sue as plaintiff in that assumed name (35 C. W. N. 432;⁵ 34 Bom. L. R. 1112;⁶ 32 Bom. L. R. 212⁷); but O. 30, R. 10 enables a person to sue him as defendant in that assumed name. This distinction which has been made in O. 30 itself has, in our judgment, been made in the interest of commerce. There is no inconvenience or injustice, if a person carrying on business under a firm name or any other assumed name is made to sue in his real name, but different and weighty considerations would apply when he is sued by another person in the assumed name in which he carries or has carried on business. Business may be carried on by correspondence and orders may be, and are usually, placed from one part of the world to another through post and goods may be supplied on credit on such orders. A producer or merchant living in one part of the globe cannot be expected to know or to make enquiries and in some cases it is not possible for him to know or to make enquiries as to who is the owner of the business that is being carried on in an assumed name, and in most cases he would only know the name of the real owner after he had brought his suit, for the defendant must then appear in his own name (O. 30, R. 6.) If it were to be held that a decree obtained by such a producer or merchant in a suit instituted against the assumed name is a void decree, it would lead to manifest hardship, would open up a wide door to fraud and would sap the credit on which commercial dealings largely rest. In our judgment d O. 30, R. 10, Civil P. C., rests on these considerations and they must be kept in view in construing that rule. Provisions similar to those of O. 30 were not in the Civil Procedure Code of 1882. That order was introduced in the Code of 1908 and its provisions follow closely the provisions of O. 48A of the Rules of the Supreme Court of England. Rules 1 and 10 of O. 30, Civil P. C., are almost verbatim reproductions of Rr. 1 and 11 of the Supreme Court Rules.

5. ('31) 18 A. I. R. 1931 Cal. 770 : 134 I. C. 1200 : 35 C.W.N. 432, Neogy Ghose & Co. v. Nehal Singh.

6. ('32) 19 A.I.R. 1932 Bom. 516 : 140 I. C. 519 : 34 Bom. L. R. 1112, Bhagwan v. Hiraji.

7. ('30) 17 A.I.R. 1930 Bom. 216 : 127 I. C. 412 : 32 Bom. L. R. 212, Samrathrai v. Kasturbhai.

The point which we have to consider is whether O. 30, R. 10 applies only to a single individual carrying on business under a firm name or an assumed name or whether it also applies to a number of individuals carrying on business either under a firm name or an assumed name, when those individuals do not in law constitute a partnership resting on contract. The contention of the respondents is that it applies only to a single individual. To support their contention they rely upon the cases in (1895) 2 Ch. 630⁸ and I.L.R. (1937) Mad. 28.⁹ There are also some cases decided by the Lahore High Court which support their contention. The learned advocate appearing for f the appellants relies upon the case in A. I. R. 1941 Pat. 596.¹⁰ There is no decision of this Court on the point.

On the construction of R. 10 one point is clear. You can sue a man in his firm name or in the assumed name in which he is carrying on business only in respect of matters which are connected with the business which he is carrying on under that name. If a person, say Ram Chandra Dutt carries on cloth business under the name of John Smith & Co. or the Bengal Traders Bureau, but takes meat on credit in his own name from a butcher, the butcher cannot take advantage of the provisions of R. 10 and sue him in the name of either John Smith & Co., or the Bengal Traders Bureau. But if on the other hand he had obtained cloth on credit for the purpose of his trade, he can be sued in those names. This conclusion follows from the phrase "may be sued in such name or style as if it were a firm name" occurring in R. 10. This is also what Lindley L. J. observed in (1895) 2 Ch. 630⁸ at page 635.

The Indian decisions which have taken the view that R. 10 applies only to a single individual proceed on the authority in (1895) 2 Ch. 630⁸ and the case in (1893) 2 Q. B. 96.¹¹ It h is, therefore, necessary to examine those two cases a little more in detail. In the first mentioned case the three plaintiffs, the MacIvers, and Sir John Burns, a Scotchman domiciled in Scotland, carried on a partnership business under the name and style of Clyde Navigation Co. That partnership was dissolved in April 8. (1895) 2 Ch. 630 : 64 L. J. Ch. 681 : 12 R. 467 : 73 L.T. 39: 44 W.R. 40, Mac Iver v. G. & J. Burns, 9. ('36) 23 A. I. R. 1936 Mad. 707 : 164 I. C. 806 : 71 M. L. J. 373: I. L. R. (1937) Mad. 28, Chidambaram Chettiar v. National City Bank of New York. 10. ('41) 28 A. I. R. 1941 Pat. 596 : 197 I. C. 730 : 20 Pat. 755 : 22 P. L. T. 682, Alekh Chandra v. Krishna Chandra. 11. (1893) 2 Q.B. 96 : 62 L.J.Q.B. 485 : 4 R. 441 : 69 L. T. 329 : 41 W. R. 563, St. Gobain v. Hoyer-mann's Agency.

- a 1895. The suit was in respect of accounts of that dissolved partnership. Sir John Burns was the sole proprietor of a business which he carried on under a firm name, G. & J. Burns. That business had several branches, one being at Liverpool. The summons of the suit on Sir John Burns was served on a person at Liverpool who had control of his Liverpool branch office, under the provisions of O. 48A, R. 3 of the Rules of the Supreme Court, which corresponds to O. 30, R. 3, Civil P. C. Sir John Burns moved to set aside the service and the subsequent proceedings on the ground that O. 11 of the Rules of the Supreme Court was applicable. The plaintiffs contended that as Sir John Burns carried a business under an assumed name the suit could be brought against him under the provisions of O. 48A, R. 11 (=O. 30, R. 10, Civil P. C.), and so service of summons as made was effective by virtue of the provisions of O. 48A, R. 3. The Court held that the service was bad as the suit did not fall within R. 11 of O. 48A on the ground that it had no connexion with the business which Sir John Burns carried on in the firm name of G and J Burns. The point as to whether R. 11 contemplates only the case of a single individual trading under a firm name or an assumed name was not a point in issue in the case. In one part of his judgment Lindley L. J., no doubt observes that "rule 11, which has really nothing to do with partnership rules, is tacked on to apply to the case of a single individual who carries on business, either in the name of a firm, or, as it is expressed in the rule, under some name other than his own," but in a later part of his judgment he made the further observation that the scope of that rule was to "authorise the suing persons in the name in which they carry on business," the underlying principle being "to facilitate the carrying on of actions against those who conceal their names."
- d In (1893) 2 Q. B. 96¹¹ a German, domiciled in Germany, was the defendant. He carried on business under an assumed name: "Hoyer-mann's Agency, Phosphatfabrick Hanover." The plaintiffs brought a suit in England for damages for breach of contract against him in the assumed name in which he was carrying on business. He had an office in the city of London where he booked orders. The writ of summons was served on his Manager at his London office. The question was whether the service was good. The question that was raised in that case was accordingly the same as in (1895) 2 Ch. 630.⁸ The point for decision was not whether O. 48A, R. 11 contemplates only the case of a single individual or more individuals than one, though there are obser-

vations to the effect that it covers only the case of a single individual. These two cases are not accordingly direct authorities in favour of the respondents.

A business can be carried on either by one person, either in his own name or in an assumed name, or by a number of persons in association. In the last mentioned case the association of those persons would ordinarily in England be a partnership concern. There is no such conception in England, the like of which we have here in the case of a joint Hindu trading family, of a group of persons trading together but not constituting a firm. In view of that fact it would, in our judgment be not right to follow blindly the dicta of Judges of the English Courts where they say that R. 11 of O. 48A relates to the case of a single individual. On this point we fully endorse the view expressed by the Patna High Court in A. I. R. 1941 Pat. 596.¹⁰ Differing from the decisions of the Madras High Court in I. L. R. (1937) Mad. 28,⁹ we agree with that decision of the Patna High Court. No convincing reasons have been given in the judgment of the Madras High Court. The contrast between the language of Rr. 1 and 10 of O. 30 made therein does not carry the matter far, and we do not agree with the observations⁹ that here in India "there is no reason to depart from the view taken in the English cases" on the scope of that rule.

In A. I. R. 1941 Pat. 596¹⁰ the Patna High Court seems to have proceeded upon the view that O. 30, R. 10 contemplates the case of a single person, and that for the purpose of that rule a joint Hindu family is to be considered as a single person. This part of that judgment which attributes to a joint Hindu family a personality, and that of a single person, has been criticised by the learned advocate for the respondents with great force. We feel the force of those criticisms, but prefer to reserve our opinion on that aspect of the matter. For some purposes no doubt a joint Hindu family has been considered as an unit and a person. Those cases are noticed in the judgment of the Patna High Court in 16 Pat. 441¹² at p. 445. The case in 48 ALL. 395,¹³ a case under S. 4, Companies Act, is also a case where that view was taken.

Order 30, rule 10 uses the words "any person." The singular number is there, but

12. ('37) 24 A.I.R. 1937 Pat. 455 : 170 I. C. 357 : 16 Pat. 441 : 18 P. L. T. 527, Srikantlal v. Sidheswari Prosad.

13. ('26) 13 A.I.R. 1926 All. 337 : 95 I. C. 152 : 48 All. 395 : 24 A. L. J. 413, Mewa Ram v. Ramgopal.

the word "person" must be given the meaning assigned to it by s. 3 (39), General Clauses Act. Unless there is something repugnant in the context or in the subject, the term "person" will include any association or body of individuals whether incorporated or not." We do not find either anything in the context or subject which would lead to us to hold that R. 10 contemplates the case of a single individual only, and not of many individuals. Of course, where more than one individual trade under a firm name or under any other assumed name and form a partnership resting on contract, the case would come under R. 1 of O. 30, but where they do not form a partnership we do not see any convincing reason why they should not come within R. 10. We have already stated in the earlier part of our judgment the object of that rule. The view we are taking of that rule is consistent with that object and the contrary view, which has been taken by the Madras High Court in I. L. R. (1937) Mad. 28,⁹ would defeat that object which is behind that rule. We accordingly hold that the decree obtained by the plaintiffs against the "firm of Jodhanprosad Bhagwandas" in the Chaibassa Court is not a nullity. Subject to other issues raised in this suit it is binding on all the persons who had interest in the business that was carried on under that name and style. The result is that this appeal is allowed and the case is remanded to the lower Court. That Court would decide the other issues in the case. Costs do abide the final result. Hearing fee in this Court is assessed at 10 gold mohurs.

R.K.

*Appeal allowed.***A. I. R. (31) 1944 Calcutta 143**

AMEER ALI J.

*Ramlal Bhadani and another —**Plaintiffs*

v.

*Dass Bank Ltd. and another —**Defendants.*

Suit No. 1582 of 1941, Decided on 20th July 1942.

Conversion—Innocent agent—Liability of—Bank on instructions of its fraudulent customer collecting amount of forged draft delivered to it by customer and allowing customer to withdraw it in ignorance of true owner's claim — Bank held guilty of conversion—True owner's negligence held did not constitute estoppel.

The plaintiffs who carried on business at Gaya bought a draft payable to themselves in the name of their Calcutta branch from the Imperial Bank at Gaya. The draft was drawn on Imperial Bank Calcutta. The plaintiffs sent the draft through unregistered post to their Calcutta branch and in the course of transmission a stranger, A, who had an account

with the Dass Bank in Calcutta obtained wrongful possession of the draft, forged an endorsement and delivered it to the Das Bank for collection and credit to his account. The Dass Bank accordingly got the draft cashed, credited the proceeds to A's account and allowed him to withdraw the same. In the suit by the plaintiffs against the Dass Bank for conversion :

Held that (1) as the plaintiff's negligence in sending the draft by unregistered post was not the direct cause of the loss it could not constitute a bar or estoppel preventing the plaintiffs from relying on their title : [P 144c,d]

(2) the bank though an innocent agent of a fraudulent or criminal principal was guilty of conversion and its liability was not affected by the fact that it received the draft in good faith as the property of its principal and dealt with it in accordance with its principal's instructions and in ignorance of the true owner's claim : (1876) L. R. 1 C. P. 578; (1894) 2 Q. B. 157 and ('34) 21 A. I. R. 1934 Bom. 400, *Rel. on*; (1891) 44 L. T. 767; (1899) 2 Q. B. 205 and (1924) 1 K. B. 775, *Expl.* [P 145a,b,c]

S. R. Bachawat and D. C. Sethia —

for Plaintiffs.

P. B. Mookerjee — for Defendant Bank.

Judgment. — This is a commercial suit. Although argued on both sides by counsel comparatively junior in the profession it was, if I may say so, as ably prepared and presented as any case that I have heard in this Court, and that is saying a good deal. Although the plaintiff will succeed nothing more, in my opinion, could have been done by Mr. P. B. Mookerjee to whose arguments on behalf of the defendants I shall refer and the same must be said of Mr. Bachawat and Mr. Sethia who appeared for the plaintiffs.

The short facts are as follows: On 12th May 1941, one Mohanlal Desai, the bent of whose particular genius will appear from the circumstances of the case, opened an account with the defendants, the Dass Bank, with Rs. 500. This account is exhibited and in the light of what subsequently transpired tells its own little story. On 9th June 1941, this account stood to credit at Rs. 5 and on the same day the credit amounted to Rs. 2605. On 10th June 1941, Rs. 2500 had been withdrawn and the amount standing to Mr. Desai's credit was then Rs. 105. Mr. Desai has disappeared. The increase of Rs. 2600 on 9th June 1941 is thus explained. The plaintiffs carry on business under the name of Ramlal Jugalkishore at Gaya. Ramlal Jugalkishore on that date bought a draft payable to themselves in the name of their Calcutta business Jitenram Ramlal. This draft No. AB 91,662 was bought by Ramlal Jugalkishore from the Imperial Bank at Gaya and was drawn on Imperial Bank, Burrabazar branch. It was posted and sent by ordinary unregistered post on 11th June 1941. Jitenram Ramlal notified the Imperial Bank that the

a draft has not come to hand. On 27th August 1941, this suit was filed by the plaintiffs against the bank for damages for conversion and alternatively for money had and received. It is admitted that the endorsement on the draft in favour of the Dass Bank is a forgery by our ingenious gentleman Mr. Mohanlal Desai who evidently obtained it in the post. The issues raised by Mr. N. C. Chatterjee, if I remember rightly, were as follows :

(1) Did the defendant bank act wrongfully (a) in taking delivery of the draft; (b) presenting the same to the Imperial Bank; (c) in obtaining payment from the Imperial Bank; (d) in making payment to defendant 2, the said ingenious gentleman. (I had forgotten to mention that he was a defendant. Of course he has not entered appearance.)

(2) Do the facts alleged in the plaint constitute conversion by the defendant ?

(3) Was the plaintiff guilty of negligence as alleged in para. 5 of the written statement and, if so, is the claim barred by estoppel ? The negligence alleged by the defendant bank is the sending of the draft by ordinary unregistered post.

(4) Did the defendant bank receive payment of the draft on behalf of its customer in good faith and without negligence ?

(5) Damages.

I will eliminate issue (4) in view of the fact that (although no negligence on the part of the defendant is alleged) such negligence would only be material in the event of the bank relying on S. 131, Negotiable Instruments Act, or upon an analogous principle. Section 131 only applies in case of crossed cheques, and Mr. Mookerjee was unable to discover any analogous principle recognised by the law.

Issue 3. Negligence of the plaintiff—this is pleaded in the written statement but is only material in so far as such negligence can constitute a bar or estoppel preventing the plaintiff from relying upon their title. Unfortunately, for Mr. Mookerjee, the law is strict. Such negligence in order to constitute an estoppel must be the direct cause of what has taken place. Moreover on the authorities both in England and India it is difficult to contend that mere sending through the post constitutes such negligence.

In fact it comes down to the question of conversion, and the English law of conversion is peculiarly intolerant—shall we say, to the convertor or peculiarly favourable to the owner. Let us take the bank's case, argued with much ingenuity by Mr. Mookerjee, that the bank in collecting the draft for Mohanlal was an innocent agent; that is admitted—that there was no duty on the part of the bank to do anything for the plaintiffs : at any rate no duty to make things better; that, in so far as stress is laid upon the changing of the draft into cash. The draft according to mercantile

usage is already cashed; lastly the bank only took and returned the article to the person who delivered it to the bank—the parcel in cloak-room theory. This theory was no doubt discovered by Mr. Mookerjee in *Rymell's case*, and from thence extracted and developed, (1881) 44 L. T. 767.¹ In that case so far as I remember, the defendants were auctioneers. The article had been deposited by a person who had created a legal mortgage over it and then, before the sale by the defendants as auctioneers, had ordered the defendants to deliver it to a third person. It was held that the defendants had not dealt with the article in question, they had received it from A—they had made it over to A's order. The illustration or example upon which one learned Judge has based his decision was the delivery of a package to a cloak room or to a carrier and the return of such package to the owner. Mr. Mookerjee also relied upon (1899) 2 Q. B. 205.² Certain portions of the judgment are in his favour and certain portions, against him. He relied upon the principle laid down in (1924) 1 K. B. 775³ that mere credit to the client's account before collection does not make the bank a buyer. This, however, is not contended for by the plaintiffs.

The plaintiff's contentions are that this is not a cloak room or carrier case; it is not a case where the parties are restored to their original position. It is not a case of return or if return, it is return in a different form. That "conversion" must be inferred from the following set of circumstances—that the bank took the draft, that it endorsed it payable to itself, that it presented it to another bank for collection, that it got it cashed, that it credited the non-owner, that it allowed the non-owner to withdraw or take back the money. This position is covered by the decided cases (1876) L. R. 1 C. P. 578,⁴ (1894) 2 Q. B. 157⁵ followed in a Bombay case, 59 Bom. 97⁶ at p. 104. These decisions and the law generally have been summarised in Hort on Banking (Ch. 9). The

1. (1881) 44 L. T. 767, *National Mercantile Bank Ltd. v. Rymell*.

2. (1899) 2 Q. B. 205 : 68 L. J. Q. B. 842 : 81 L. T. 44 : 4 Com. Cas. 227, *Union Credit Bank v. Mersey Dock*.

3. (1924) 1 K. B. 775 : 93 L. J. K. B. 690 : 131 L. T. 271 : 29 Com. Cas. 182 : 68 S. J. 716 : 40 T. L. R. 302, *Underwood Ltd. v. Bank of Liverpool & Martins*.

4. (1876) L. R. 1 C. P. 578 : 45 L. J. C. P. 562 : 34 L. T. 729 : 24 W. R. 759, *Arnold v. Cheque Bank*.

5. (1894) 2 Q. B. 157 : 63 L. J. Q. B. 674, *Kleinwort v. Comptoir National d'Escompte de Paris*.

6. ('34) 21 A.I.R. 1934 Bom. 400 : 152 I. C. 609 : 59 Bom. 97 : 36 Bom. L. R. 929 (F.B.), *Madhavdas Jethabhai v. Devidas Vardasa*.

a best and most concise summary of the position of an innocent agent who is nevertheless liable for conversion is to be found in Halsbury, Vol. I, S. 47 — I presume this corresponds to 492 of the old edition :

"An agent while acting on his principal's behalf acquires the actual or constructive possession of goods which are not in fact the property of his principal and deals with them in any manner which is obviously wrongful if his principal is not their owner or duly authorised by their owner—as by selling and delivering them to a stranger or otherwise purporting to dispose of the property in them — is guilty of a conversion."

b His liability is not affected by the fact that he received them in good faith as the property of his principal and deals with them in accordance with his principal's instructions and ignorance of the true owner's claim unless the true owners are stopped from denying the principal's authority to dispose of them or unless the agent is a bankrupt receiving payment of the cross cheque on behalf of a customer. That is a clear and simple statement of the law by which the defendant bank is hit. I should have stated that Mr. Bagchi, the accountant of the bank gave his evidence fairly and I accept it. The bank was an innocent agent of a fraudulent or criminal principal. The suit therefore must be decreed and costs will follow the event certified for two counsel. There will be a decree for the amount claimed with interest at 6%.

G.N.

Suit decreed.

A. I. R. (31) 1944 Calcutta 145

PAL J.

Sarat Chandra Mitra and others —

Defendants — Appellant

v.

Santosh Kumar Halder and others —

Plaintiffs — Respondents.

d Appeals Nos. 812 and 813 of 1940, Decided on 8th February 1943, from appellate decrees of Dist. Judge, 24 Parganas at Alipore, D/- 16th January 1940.

(a) Bengal Tenancy Act (8 of 1885), S. 106—Suit held for correction of entry under head "amount of rent payable."

The entry under the head rent payable showed Rs. 43-11-0 as the amount of rent payable. The plaintiffs in their plaint disputed the correctness of this entry and asserted that the amount should be Rs. 15:

Held that the plaintiffs were seeking only a decision of their dispute regarding the entry as to the amount of rent payable and the suit came within the provisions of S. 106 : 67 I. C. 241 (Cal.); ('14) 1 A. I. R. 1914 Cal. 851 and ('18) 5 A. I. R. 1918 Cal. 799, *Ref.* [P 148e,f]

(b) Bengal Tenancy Act (8 of 1885), Ss. 105 and 106 — Scope.

Section 105 proceeds on the assumption that the entry is correct. It settles a fair and equitable rent and that becomes a new settlement of rent. The rent

found payable in a suit under S. 106 is not a rent settled but is the existing rent about which there was a dispute and that dispute is settled. [P 148f]

(c) Bengal Tenancy Act (8 of 1885), S. 106—Fact of actual possession and not title to possession is to be determined.

The suit under S. 106 only calls for a decision on the question of possession at the date of the final publication. The dispute as to the title to possess, e. g., question of benami, does not fall to be decided in the suit. [P 150d,e]

(d) Civil P. C. (1908), S. 66 (S. 317 of 1882 Code) — Sale in name of person other than certified purchaser in 1903—Suit under S. 106, Ben. Ten. Act, is governed not by S. 66 but by S. 317 of 1882 Code.

Sections 11 and 317, Civil P. C. of 1882 have been repealed by the Code of 1908 and re-enacted in its Ss. 9 and 66. This repeal cannot affect the remedy of the alleged real purchaser under the old Code. Where therefore an auction sale has been held in 1903, i. e., before the Code of 1908 and the purchase is made for the benefit of a person other than the certified purchaser, a suit under S. 106, Ben. Ten. Act, would be governed by S. 317 of the Code of 1882 and not by S. 66 of the Code of 1908 even though instituted after 1908. [P 151b,d; P 152a]

C. P. C. —

('44) Chitale, S. 66 N. 4.

('41) Mulla, Page 270.

(e) General Clauses Act (1897), S. 6—Repeal—Effect of, stated.

If the repealed Act simply enacted some restraints or limitations in respect of a remedy otherwise provided, the repeal will remove those restraints and limitations. [P 151a]

(f) Interpretation of Statutes—Retrospective effect—Principle enunciated.

By the general principle of non-retroactivity of a law, any right or liability arising out of a jural relation constituted before the new law came into force or created by a jural fact or event taking place before the new law or any relief or remedy in respect of that right or liability remains unaffected by the new law. [P 151c]

Amarendra Nath Bose and Hemanta Kumar Bose — for Appellants.

Nitya Ranjan Biswas — for Respondents.

Judgment.—These two appeals arise out of a suit under S. 106, Ben. Ten. Act. The dispute relates to the entries in Khatian No. 312 of mouja Sahapore, J. L. 8, P. S. Behala. The khatian is Ex. 20 in this case. It records defendant 2, Rai Manmathanath Mitra Bahadur, owner of touzi No. 93 in 5 annas 6 pies share and defendant 3, Nagendranath Palit, owner of touzi No. 101 in 10 annas 6 pies share as the landlords, Kumudini Dasi as the tenant in possession, Rs. 43-4-1 as the rent payable for the tenancy and 2.02 acres as the area of the lands comprising the tenancy. The status of the tenant is recorded as tenureholder and the rent is recorded as liable to enhancement.

The plaintiffs' case is that their uncle Kedarnath Halder was the real tenant. Their uncle Kedarnath Halder and after him his

- a widow Basanta Kumari having died before the Cadastral Survey leaving no children, they inherited the estate of Kedarnath and thus became entitled to and came into possession of the tenancy in question at the date of the Cadastral Survey. Consequently, their name should have been recorded as tenants in the place of the name of defendant 1 Kumudini Dasi. The tenancy in question was admittedly sold in execution of a decree for its own arrears of rent in 1903 and the certified auction-purchaser at that sale was one Jadunath Sen. This Jadunath Sen in 1904 executed a deed of release (Ex. C) in favour of one b Rashbehari Mitter, husband of defendant 1, stating that the purchase was with the money of and for the benefit of Rashbehari.

The plaintiffs' case is that the purchase was really with the money of and for the benefit of Kedarnath Haldar, that Jadunath Sen was merely a benamidar of Kedarnath and that the release (Ex. C) from Jadunath was really taken by Kedarnath in the benami of Rashbehari, that on Rashbehari's death his widow, defendant 1, executed another release (Ex. 1) whereby she admitted all these facts and relinquished her claim to the tenancy in favour of the real purchaser Kedarnath Haldar in c 1916, and that since the purchase Kedarnath Haldar and after him his heirs and successors including the plaintiffs have all along been in possession of the tenancy by exercising various acts of possession and of ownership. As regards the entries relating to the amount of rent payable and the area for which it is payable the plaintiffs' case is that originally the rent payable was Rs. 49-2-13 for an area of 19 bighas 4 cottas and 8 chhataks. After the aforesaid auction sale a portion of the lands of this tenancy was acquired by the Government for K. F. Railway and Kedarnath Haldar sold away portions to different persons. The landlords, defendants 2 and 3, gave kharij to these purchasers. After all these transfers and acquisitions only 2.2 acres of land are now left as comprising the tenancy in possession of the plaintiffs, for which Rs. 15 is the rent payable. The plaintiffs also questioned the entry relating to the incidents of the tenancy. The issue was decided against them by the Court of first instance and it is no longer in dispute in the appeal before me. The Cadastral Survey record was finally published on 21st August 1931 and the present suit was instituted on 21st December 1931.

d Defendant 1, Kumudini Dasi, appeared and filed a written statement on 15th December 1932, stating inter alia that she had sold away her interest in the tenancy to one Sarat

Chandra Mitra on 1st October 1931. She thus e disclaimed all present interest in the property. She however denied all the allegations of the plaintiffs relating to the title of Rashbehari and Kedarnath and asserted that her husband was the real purchaser. Defendant 2, Kumar Manmathanath Mitra Bahadur, filed his written statement on 28th September 1932, contesting the claim of the plaintiffs and defendant 3, Nagendranath Palit, filed his written statement on 12th November 1932, denying the plaintiffs' title to the tenancy. On 17th March 1933, Sarat Chandra Mitra, who was set up by defendant 1 in her written statement as the purchaser of the tenancy, f was added as a party to the suit as defendant 4. The Revenue Officer recorded the following order :

"It appears from the written statement of defendant 1 that she sold away her interest to one Sarat Chandra Mitra before the institution of the suit. As the alleged interest devolved upon Sarat Chandra Mitra subsequently to the final publication of the record of rights he is not a necessary party but he is a proper party and it is desirable that the suit should be heard in his presence. Add him as a party defendant to this suit."

Sarat Chandra Mitra appeared and filed his written statement on 4th April 1933, denying the allegations of the plaintiffs and g asserting inter alia in para. 4 of his written statement that he having purchased the tenancy on 1st October 1931, before the institution of the suit, and the plaintiffs not having made him a party within four months from the date of the publication of the Cadastral Survey record, the suit as against him was barred by limitation. On 26th April 1933, the suit was heard on two preliminary issues, viz., (1) Is the suit barred by limitation? (2) Is the suit bad for non-joinder of the under-tenants under Khatian No. 312? The Court of first instance decided issue 1 in favour of the plaintiffs on the ground that as this h was not a suit for possession but for correction of the record of rights and as Sarat Chandra purchased the tenancy after the final publication of the Cadastral Survey Record, though before the institution of the suit, he was only a proper party and not a necessary party. It, however, decided issue 2 against the plaintiffs and dismissed the suit. This decision of the Settlement Officer was upheld by the Court of appeal below. On further appeal to this Court in S. A. No. 1502 of 1934, this Court on 3rd December 1936, set aside this decision holding that the suit was not liable to be defeated by reason of the non-joinder of parties. The suit was remitted to the trial Court to be reheard according to

law with the observation that the then appellants (the plaintiffs) were entitled to all the reliefs the Courts were in a position to give them against the parties who were on the record.

During the pendency of the S. A. No. 1502 of 1934 in the High Court defendant 2, Kumar Manmathanath Mitra, died and in his place his sons including Sarat Chandra Mitra were substituted as defendants 2 (ka) to 2 (chha). Thereafter defendant 1, Kumudini Dasi, died and on 26th April 1937, the plaintiffs made an application under O. 22, R. 4, Civil P. C., for the substitution of defendant 4, Sarat Chandra, in her place as her legal representative. The Court by its order dated 2nd December 1937, allowed this application and the substitution was accordingly made. Sarat Chandra Mitra thus became defendant 4, 2 (ka) and 1 in the suit when the suit was heard after remand by the High Court. S. A. No. 812 of 1940 is by Sarat Chandra Mitra in his personal capacity. S. A. No. 813 of 1940 is by defendant 3 and the legal representatives of the original defendant 2.

Various defences were taken by the defendants and the suit went to trial on the following questions: (1) Is the suit maintainable under S. 106, Bengal Tenancy Act? (2) Was the alleged release executed in favour of Kedarnath Haldar? If so, is the said document valid and bona fide and was the same acted upon? (3) Has Kumudini Dasi been wrongly recorded as possessor in Khatian No. 312 of Mouza Sahapore P. S. Behala? Are the plaintiffs in possession of the Khatian? (4) Is the rent of the khatian fixed in perpetuity? (5) Is Rs. 15 the rent of the khatian? (6) Are plots Nos. 586 and 591 of mouza Sahapore in possession of the plaintiffs? If so, do they appertain to khatian No. 312? (7) Is the suit barred by limitation? (8) Are the plaintiffs estopped under S. 41, T. P. Act, from challenging the title of Sarat Chandra Mitra as purchaser of the tenancy from the admittedly ostensible tenant Kumudini Dasi? As regards question No. 6, the Assistant Settlement Officer found that the plots were already recorded in khatian No. 312. There is now no dispute regarding this fact. Question No. 4 was decided against the plaintiffs by the Assistant Settlement Officer and that matter is also not before me in these appeals. Question No. 7 was decided in favour of the plaintiffs on the ground that the issue as to limitation was no longer open for decision after the order of remand by the High Court. Question No. 5 was decided partly in favour of the plaintiffs. The Assistant Settlement Officer held that the area

now comprising the tenancy in possession of the plaintiffs was 2.2 acres or 6 bighas 2 cottas and 3 chhataks and that the proportionate rent payable for khatian No. 312 would be Rs. 18-11-0.

All the other questions were decided in favour of the plaintiffs and their suit was decreed by the Assistant Settlement Officer who ordered as follows: (1) (a) That in place of the recorded tenant Kumudini Dasi plaintiff 1 and the legal heirs of the original plaintiff 2 who have already been made parties will be recorded; (b) That plaintiff 1 will have 8 annas share in the jama and the legal heirs of plaintiff 2 will have the remaining 8 annas in equal shares. (2) That the status of the tenure will remain unaltered. (3) (a) That in place of the recorded rent of Rs. 43-4-0 Rs. 18-11-0 will be noted as the rent payable; (b) That the share payable for Touzis Nos. 93 and 101 will be according to the share of these touzis already recorded in the khatian (i. e., 5 annas 6 pies for Touzi No. 93 and 10 annas 6 pies for Touzi No. 101). This order was repeated in Bengali with the addition of the following words at the end: *Aie khazana 1345 saler paila Baishak haoite prapya hoibe* (this will be effective from 1st Baisakh 1345 B.S.).

The present appellants preferred two separate appeals from this decision and the learned District Judge by his judgment dated 16th January 1940, dismissed these appeals and confirmed the above decision of the Assistant Settlement Officer. Mr. Bose, appearing in support of the appeals before me, raises the following points, namely: (1) (a) That the relief claimed in prayers 'kha' and 'ga' of the plaint is not available in a suit under S. 106, Ben. Ten. Act; (b) That the relief granted in respect of these prayers is not supported by the evidence on the record and is not according to the case made by the plaintiffs; (c) That in any event the Court of appeal below went wrong in maintaining the last clause in the order of the Assistant Settlement Officer to the effect that the rent of Rs. 18-11-0 should be effective from 1st Baisakh 1345 B. S. (2) (a) That the Courts below went wrong in holding that the issue as to whether or not the suit was barred by limitation was no longer open for decision after remand by the High Court; (b) That Sarat Chandra Mitra as representing the tenancy having been brought on the record more than four months from the date of the final publication of the record, the suit as against him was barred by limitation under S. 106, Ben. Ten. Act. (3) (a) That as the title claimed by Sarat Chandra Mitra and the original defendant 1 Kumudini Dasi is a title under a purchase certified by the Court and

- a as the plaintiffs claim on the ground that the purchase was made on behalf of Kedarnath Halidar through whom the plaintiffs claim, the suit is not maintainable under S. 66, Civil P. C.; (b) That the Court of appeal below went wrong in holding that the present S. 66, Civil P. C., was not applicable to this suit as the sale in question was held in 1903 before the present Code of Civil Procedure came into force; (4) (a) That the Court of appeal below went wrong in deciding in favour of the plaintiffs without considering the question whether or not Kedarnath Halidar was the real purchaser as alleged by the plaintiffs; (b) That the Courts below went wrong in not raising and trying the material issue in the case, viz., whether Kedarnath Halidar was the real purchaser at the execution sale as alleged by the plaintiffs; (5) That inasmuch as a release is not a transaction required by law to be by a registered instrument, the Court of appeal below went wrong in deciding the question whether or not the plaintiffs were estopped under S. 41, T. P. Act, from denying the title of Sarat Chandra acquired by his purchase from the admittedly ostensible tenant Kumudini, on the sole ground that the alleged deed of release of 1916 having been a registered instrument, Sarat Chandra, the purchaser in 1931, must be deemed to have purchased with notice of the real title.

Second Appeal No. 812 has no concern with the points 1 (a), (b) and (c).

The relevant portion of S. 106, Bengal Tenancy Act, stands thus :

"In proceedings under this Part, a suit may be instituted before a Revenue Officer at any time within four months from the date of the certificate of the final publication of the record of rights under sub-s. (2) of S. 103A of this Act, by presenting a plaint on stamped paper for the decision of any dispute regarding any entry which a Revenue Officer has made in, or any omission which the said officer has made from, the record,

- d whether such dispute be between landlord and tenant or between tenant and tenant, or as to whether the relationship of landlord and tenant exists or as to any other matter. . . ."

Prayers "kha" and "ga" in the plaint are the following :

"(kha) It may be decreed and ordered that the landlords defendants 2 and 3 are entitled to an annual rent of Rs. 15 only for the lands in suit. (ga) It may be decreed and ordered in favour of the plaintiffs that defendants 2 and 3 are entitled to recover from the plaintiffs annually Rs. 15 only as rent for the disputed property."

These two prayers are practically the same. The question is whether they can be said to be "for the decision of any dispute regarding any entry." If so, then certainly such prayers will be within the scope of a suit under S. 106, Bengal Tenancy Act. Obviously these prayers

relate to the entry recording the amount of rent payable for the tenancy. The entry under this head shows Rs. 43-11-0 as the amount of rent payable. The plaintiffs in para. 3 of their plaint dispute the correctness of this entry and assert that the amount should be Rs. 15. In that paragraph of the plaint they plead their reason for saying that the amount should be Rs. 15. In my opinion, by these prayers the plaintiffs are seeking only a decision of their dispute regarding the entry as to the amount of rent payable. The decision will not be a settlement of rent within the meaning of S. 113, Bengal Tenancy Act, but will only settle the dispute as to what should be the correct entry under the head "amount of rent payable." Such a dispute is within the scope of a suit under S. 106, Bengal Tenancy Act : 67 I.C. 241,¹ 18 C.W.N. 949,² and 22 C.W.N. 275.³ Herein lies the difference between S. 105 and S. 106 in this respect. Section 105 proceeds on the assumption that the entry is correct. It settles a fair and equitable rent and that becomes a new settlement of rent.

The Assistant Settlement Officer decided that the rent payable for Khatian No. 312 will be Rs. 18-11-0 for 2.02 acres or 6 bighas 3 cottas and 3 chhataks of land which is recorded to be the present land of the tenancy. He proceeded with the finding that originally the area of the tenancy was 19 bighas 4 cottas and 8 chhataks and for this area the rent payable was Rs. 49-13-1. Of this Rs. 16-14-11 was payable to the proprietors of Touzi No. 93 in their 5 annas 6 pies share and Rs. 32-14-2 was payable to the proprietors of Touzi No. 101 in their 10 annas 6 pies share. A portion of this area was subsequently acquired for the Port Commissioners and after this acquisition the area of the tenancy became 14 bighas 1 cotta and 15 chhataks. It is in evidence that the rent payable to the proprietors of Touzi No. 93 was reduced as the result of this acquisition to Rs. 12-4-0. This reduced rent of Rs. 12-4-0 bears the same proportion to the original rent of Rs. 16-14-11 payable to the proprietors of this touzi as the reduced area 14 bighas 1 cotta and 15 chhataks bears to the original area 19 bighas 4 cottas and 8 chhataks. This shows that the reduction in rent was proportionate to the reduction in area. Applying this proportion, the total amount of rent payable for 14 bighas 1 cotta and 15 chhataks

1. ('22) 67 I. C. 241 (Cal.), Joy Chandra v. Srijit Kumar Arun Chandra.

2. ('14) 1 A. I. R. 1914 Cal. 851 : 25 I. C. 228 : 18 C. W. N. 949, Bisheswar Ray v. Rajendra Kumar.

3. ('18) 5 A. I. R. 1918 Cal. 799 : 38 I. C. 56 : 22 C. W. N. 275, Upendra Lal v. Jogesh Chandra.

a becomes Rs. 43-4-1. This is the rent recorded in the Cadastral Survey Khatian No. 312. The Assistant Settlement Officer thence concluded that this was the rent payable after the land acquisition proceedings. Thereafter, however, the area of tenancy has decreased from 14 bighas 1 cotta and 15 chhataks to only 6 bighas 2 cottas and 3 chhatakas as is shown by the entry as to the area. But the entry as to the amount of rent retains the old figure Rs. 43-4-1. The Assistant Settlement Officer, therefore, concluded that this entry was wrong. In order to decide what should be the correct figure he applied the rule of proportion and b found Rs. 18-11-0 to be the amount payable for the present area. He seems to have followed the principle of S. 52 (4), Ben. Ten. Act. On appeal the learned District Judge affirmed this decision of the Assistant Settlement Officer. He observed :

"It is said that the rent fixed by Mr. Duval in 1916 is being paid all along; but there is no doubt that the area has been reduced by acquisitions and the reduction of rent is quite justified."

Mr. Bose contends that both the Courts have gone wrong in this respect. He contends that the learned District Judge is hopelessly wrong in saying that the area has been reduced by acquisitions. It is the case of neither c party that there was any acquisition of the land of this tenancy after the acquisition for the Port-Commissioners. The rent became Rs. 43-4-0 after and as a result of that acquisition. Mr. Bose further contends that the Assistant Settlement Officer was right in holding that as a result of the acquisition the rent became Rs. 43-4-0. But after that he ignored the case made by the plaintiffs altogether and proceeded on an entirely new case which the defendants had no opportunity of meeting. It must be said that Mr. Bose's criticism of the appellate judgment on the d point is correct. It is the case of neither party that the reduction in area from 14 bighas odd to 6 bighas odd was due to any further acquisition of the land of the tenancy under the Land Acquisition Act. The case of the plaintiffs will appear from para. 3 of their plaint. There they ascribe this further reduction to their own act, namely, to sales of different portions to different persons by their predecessor Kedarnath. Prima facie these sales would not sever the lands sold from the tenancy and would not entitle either the vendor or the purchasers to claim any splitting up of the tenancy. The reduction by this process would not entitle the tenant to claim any reduction in rent. The entry as to the area in such a case will be wrong if it does

not include the portions sold away. The e plaintiffs' case is that after these sales the landlords allowed splitting up and the rent was accordingly re-adjusted. This must have been by the act of the parties and in order to entitle the plaintiffs to any relief on this count they must establish the case made by them in the plaint. Otherwise the entry in Khatian No. 312 as to the amount of rent payable will be unimpeachable, though the entry as to the area will be wrong if it does not include the lands thus sold away. In my judgment, therefore, the Assistant Settlement Officer went wrong in applying to this case the rule of proportion as laid down in S. 52 (4), f Ben. Ten. Act. The plaintiffs must, first of all, make out the case which would entitle them to split up the rent. Otherwise, the rent payable must be Rs. 43-4-0 and for this amount the lands of Khatian No. 312 as also the lands sold away shall equally remain under liability.

Mr. Bose, in my opinion, is also correct in saying that the order that the rent of Rs. 18 odd will come into effect from 1st Baisakh, 1345 B.S. is uncalled for in this case. As I have pointed out above, the rent found payable in a suit under S. 106, Ben. Ten. Act, is not a rent settled, but is the existing rent about which there was a dispute and that g dispute is settled. Of course the order to a certain extent is in favour of the landlord, inasmuch as it does not affect his right to recover at the recorded rate for the past period. But it may prejudice his right to have further settlement of rent by attracting the operation of S. 113, Ben. Ten. Act. This portion of the order cannot therefore be allowed to stand.

Coming now to the second point taken by Mr. Bose, it appears to me that the Courts below were right in disallowing the defendants to re-agitate the question after remand by the High Court. As has been pointed out above, h the issue as to limitation was specifically raised and decided against the defendants by the Assistant Settlement Officer by the very judgment in which he decided the issue as to the non-joinder of parties in their favour. The High Court decided this last named issue against the defendants. The defendants would have averted this defeat if they could successfully set up the other issue decided against them by the Courts below. The decision of the High Court is supportable only if both the issues raised there be taken to have been decided against the defendants. The issue as to limitation was decided against the defendants by the Courts below. The other issue was expressly decided by the High Court,

a against them. The final result implied an acceptance by the High Court of the decision of the Court below on issue 1. As regards the fifth point raised by Mr. Bose, it must be confessed that there is much substance in what Mr. Bose contends. I am not sure if a release of the kind in question in this suit is at all a transaction relating to immovable property. In any case it is not a transaction required by law to be by a registered instrument, and consequently Sarat Chandra shall not be affected with constructive notice by the registered deed of release under Explan. 1 of S. 3, T. P. Act. The question, however, does
b not, in my opinion, arise in this suit at all. In this suit we are concerned only with the state of affairs existing at the date of the final publication of the Cadastral Survey record. The only question about which an issue can be raised and decided in this suit is whether the person entered as tenant in the Cadastral Survey record was the tenant in possession at the date of the final publication or whether the claimant was in possession as tenant. If defendant 4, Sarat Chandra, acquired any right to defeat the claim of the plaintiffs by the doctrine of estoppel on account of any subsequent event, that does not
c fall to be decided in this case. In my opinion, the Courts below went wrong in allowing the parties to raise this issue in the present case. Their decisions on this question are therefore set aside and the question is left open for being agitated in any future litigation between the parties.

Coming now to the fourth point urged by Mr. Bose, I must say that there has really been no decision in this case on the question of benami raised by the plaintiffs. The Assistant Settlement Officer did not even raise any issue on this point. He proceeded on the footing that in a suit under S. 106, Ben. Ten. Act,
d the material question was whether the plaintiffs were the tenants in possession at the date of the final publication. The Assistant Settlement Officer found that the plaintiffs' predecessor Kedarnath Haldar and after him the plaintiffs have all along been in possession of the tenancy since the alleged auction purchase and exercised several acts of possession and of ownership in respect of the lands of the tenancy. These findings have been confirmed by the learned District Judge. In my opinion the present suit only calls for a decision on the question of possession and that decision has been given by the Courts below in favour of the plaintiffs. The dispute as to the title thus to possess does not fall to be decided in this suit, and has not been decided

here. The question of benami only affects the question of the plaintiffs' title to possess and does not affect the factum of possession in the character of a tenant. In my opinion, therefore, the Courts below did not commit any error in not raising and deciding the question whether the purchase by Jadunath Sen was with the money of Kedarnath Haldar and on his behalf. That question remains open between the parties and the parties may get the same decided in any appropriate proceeding if so advised. In the view I have taken of the fourth point the third point raised by Mr. Bose also does not fall to be decided in this case.

Section 317, Civil P. C., 1882, stood thus :

"No suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person or on behalf of some one through whom such other person claims."

In the Code of 1859 (Act 8 of 1859), S. 260 contained the corresponding provision thus :

"The certificate shall state the name of the person who at the time of sale is declared to be the actual purchaser, and any suit brought against the certified purchaser on the ground that the purchase was made on behalf of another person not the certified purchaser, though by agreement the name of the certified purchaser was used, shall be dismissed with costs."

The corresponding present S. 66 (1) stands thus :

"No suit shall be maintained against any person claiming title under a purchase certified by the Court . . . on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims."

Mr. Bose contends that the provision only affects the maintainability of a suit of the nature contemplated by the section. It is a part of the adjective law and consequently it is the law of the time when the suit is instituted and not the law of the time when the sale in question took place that shall govern the matter. The question is not free from
h difficulty. It may be contended on the other hand that the provisions contained in S. 66, Civil P. C., and the corresponding provisions in S. 317 of the Code of 1882 and in S. 260 of the Code of 1859 are not mere adjective law. When any auction purchase is made by a person with the money of another and on behalf of and for the benefit of that other a jural relation comes into existence between the real and the ostensible purchaser and rights and liabilities arise out of this jural relation. The real purchaser also acquires a right in rem, a right to the ownership of the property itself. The real purchaser will have reliefs and remedies in respect of these rights. His remedy by a suit in respect of this right

a is restrained by these provisions. Section 6, General Clauses Act (Act 10 of 1897) says:

"Where this Act or any Act repeals any enactment then unless a different intention appears, the repeal shall not affect any remedy in respect of any such right; and any such remedy may be instituted or enforced as if the repealing Act had not been passed."

Of course this saving of the remedy applies only when the repealed Act itself provided the remedy. If the repealed Act simply enacted some restraints or limitations in respect of a remedy otherwise provided, the repeal will remove those restraints and limitations. The question then will be: what will be the effect of any new restraint imposed? But it may be contended that as the sale in this case took place in 1903, the alleged real purchaser acquired right to the property in 1903 and had his remedy in respect of such right given him by S. 11 of the Code of 1882 read with S. 317 of that Code. His remedy then was affected only to the extent laid down in S. 317 of the Code of 1882. It was otherwise unrestricted. Sections 11 and 317, Civil P. C., 1882 were repealed by the present Code of 1908 and was re-enacted in its ss. 9 and 66. This repeal cannot affect his remedy under the old Code. Further apart from the above statutory provision, by the general principle of non-retroactivity of a law, any right or liability arising out of a jural relation constituted before the new law came into force or created by a jural fact or event taking place before the new law or any relief or remedy in respect of that right or liability remains unaffected by the new law. But I have my doubts if the remedy by a suit can be said to be conferred by any provision of the Code of Civil Procedure.

The question raised by Mr. Bose, however, is not *res integra*. In 47 Cal. 1108,⁴ Mookerjee A. C. J., Fletcher and Richardson JJ. held that where a sale took place and was confirmed before the Code of Civil Procedure of 1908 came into force it was S. 317 of the Code of 1882 that applied though the suit in question was instituted long after the Code of 1908 came into force. Mookerjee A. C. J. observed:

"The position then is clear that at the time when the plaintiff acquired his title by purchase at the execution sale, he was subject to the restriction embodied in S. 317 that is, he had a title enforceable against the whole world, except the certified purchaser. When, however, the Code of 1908 came into force on 1st January 1909, S. 317 of the Code of 1882 was replaced by S. 66 of the new Code which introduced a restriction of a much wider scope under the

new Code the title of the real owner cannot be enforced against the certified purchaser as also against persons who claim a title derived from the certified purchaser. The question thus arises, whether in these circumstances the wider restriction embodied by the Legislature in S. 66 of the Code of 1908 can be applied to cases where the title accrued under the Code of 1882 and was, at the time of its inception subject only to the restriction contained in S. 317 of that Code. In our opinion, the answer must be in the negative."

In this case also it was contended that these provisions embodied merely a rule of procedure. This contention was overruled and it was observed thus:

"In our opinion, this contention is based upon a narrow and superficial view of the true effect of S. 66 of the Code of 1908 and S. 317 of the Code of 1882. Each of these provisions no doubt finds a place in a Code of Procedure, but each imposes in essence a serious restriction upon the title of the real purchaser at the execution sale."

On the authority of this case it must be held that S. 66 of the present Code does not apply to the present suit. *See also* 40 C. W. N. 470⁵ (Rau J.).

Mr. Bose contends that in the above cases the effect of the change in S. 107, Ben. Ten. Act, made by the amending Acts of 1907-08 whereby the words "the Code of Civil Procedure, 1908" were inserted in the section was not at all considered. Section 107 as it originally stood in the Bengal Tenancy Act (Act 8 of 1885) ran thus:

"In all proceedings for the settlement of rents in this Chapter, and in all proceedings under the last foregoing section the Revenue Officer shall adopt the procedure laid down in the Code of Civil Procedure for the trial of suits. . . ."

After the amendment by Bengal Council Act 3 of 1898 the section stood thus:

"In all proceedings for the settlement of rents under this Part, and in all proceedings under S. 106 the Revenue Officer shall adopt the procedure laid down in the Code of Civil Procedure for the trial of suits. . . ."

After the amendment of 1907-08 the section stands thus:

"In all proceedings under Ss. 105, 105A and 106, the Revenue Officer shall adopt the procedure laid down in the Code of Civil Procedure, 1908, for the trial of suits. . . ."

Mr. Bose contends that as the section now specifically refers to the Code of Civil Procedure 1908, proceedings under Ss. 105, 105A and 106, if instituted after 1908 would be governed by the provisions of the Code of 1908 and consequently S. 66 of the Code of 1908 shall apply to such a proceeding. That would be so if what S. 66 of the Code of 1908 lays down be only a matter of procedure. Section 107, Ben. Ten.

4. ('20) 7 A. I. R. 1920 Cal. 435; 58 I. C. 327; 47 Cal. 1108; 31 C. L. J. 463; 24 C. W. N. 1011, *Promothanath Pal v. Mohini Mohan Pal*.

5. ('35) 40 C. W. N. 470, *Manir Ahmmad v. Munshi Obedal Hoque*.

^a Act, enjoins the Revenue Officer to adopt the procedure laid down in the Code of Civil Procedure, 1908. In the case reported in 47 Cal. 1108,⁴ referred to above, it was pointed out that the bar imposed by S. 66 of the Code of 1908 or S. 317 of the Code of 1882 is not a matter of procedure though the provision finds a place in a Code of Procedure. These provisions impose in essence a serious restriction upon the title of the real purchaser at the execution sale. In my opinion, therefore, the change in S. 107, Ben. Ten. Act, by the amendment of 1907-08 does not affect the authority of the decision in 47 Cal. 1108.⁴

^b If we apply S. 317, Civil P. C., 1882, to this case then there is no doubt that it does not bar this suit. This suit is not against the certified purchaser. It is not even against any person claiming through or under such purchaser. Neither Sarat Chandra, the purchaser from Kumudini, nor his predecessors-in-interest can be said to claim title through or under the certified purchaser. They claim adversely to such purchaser.

Where S. 66 of the present Code of Civil Procedure applies the question to be considered will be not whether the defendant claims title under the purchaser certified, but whether he claims title under a purchase certified. Mr. Bose contends that though Sarat Chandra is neither the certified purchaser nor does he claim under the certified purchaser, yet certainly he claims title under the certified purchase. It cannot be denied that the words "against any person claiming title under a purchase certified" substituted for the words "against the certified purchaser" lend some support to the contention of Mr. Bose. The word in the present section is "purchase" as against "purchaser" in the old section. In a sense Sarat Chandra and his predecessors-in-interest claim title under the purchase. They do not claim any title *de hors* the auction-sale. They trace their title to this sale and their case is that the purchase gave rise to a title in Rashbehari. According to this contention the section, as it now stands, bars a suit if both the parties rely on the auction-sale, and the plaintiffs claim title on the ground that the purchase was made on behalf of the plaintiffs, no matter what the defence case is, provided only that the defendant also traces his title to the same purchase. It cannot be denied that there is much force in this contention of Mr. Bose.

In my opinion, however, the present suit under S. 106, Ben. Ten. Act, is not a suit which requires to be maintained "on the

ground that the purchase was made on behalf of some one through whom the plaintiffs claim" within the meaning either of S. 66, Civil P. C., of 1908 or of S. 317 of the Code of 1882. No doubt it has been alleged in the plaint that the purchase was on behalf of Kedarnath Haldar through whom the plaintiffs claim. But the relief that can be claimed in a suit under S. 106, Ben. Ten. Act, and that has been claimed in this suit is not grounded on this fact. The relief claimed in the present suit can be and is grounded only on the factum of possession in the character of a tenant irrespective of the question whether the plaintiffs had title to such possession. In my judgment, therefore, so far as the present suit is concerned, neither S. 317 of the Code of 1882 nor S. 66 of the present Code of Civil Procedure will stand in the plaintiffs' way.

In the result S. A. No. 812 of 1940 is dismissed with costs and S. A. No. 813 of 1940 is allowed in part. The judgments and decrees of the Courts below in so far as these decided: (1) that the amount of rent payable for the tenancy is Rs. 18, (2) that the said amount is payable to defendants 2 and 3 in certain proportions, and (3) that the same is to be effective from 1st Baisakh 1345 B.S., are set aside, and the case is remitted to the Court of appeal below for the decision of the question as to the amount of rent payable for the tenancy keeping in view the observations made above in this respect. The parties will be given opportunities to adduce further evidence on this point. The questions whether Jadunath Sen purchased the tenancy at the auction-sale in 1903 with the money of, on behalf of and for the benefit of Kedarnath Haldar or Rashbehari Mitra, whether the plaintiffs are estopped under S. 41, T. P. Act, from denying Sarat Chandra's title by purchase from Kumudini and whether they are debarred under S. 41, T. P. Act, from avoiding the transfer by Kumudini to Sarat Chandra are left open.

In S. A. No. 813 of 1940 the parties will bear their respective costs in this Court. Further costs will be at the discretion of the Court of appeal below.

R.K.

Order accordingly.

A. I. R. (31) 1944 Calcutta 153

PAL J.

*Ram Tarak Singha and another —
Defendants 1 and 7—Appellants*
v.

*Salgram Singha and others, Plaintiffs
and others, Defendants—Respondents.*

Appeal No. 738 of 1940, Decided on 2nd February 1943, from appellate decree of Sub-Judge, Bankura, D/- 17th February 1940.

(a) Bengal Tenancy Act (8 of 1885), S. 38 — Suit for rent — Tenant asking for reduction — Cause for fall in prices found by lower Court as temporary — Finding based on reasoning not tenable—High Court can interfere with finding.

Questions of fact and questions of law are no doubt distinct categories involving real differences. But an apparent question of fact may really be a question of law. The question whether the economic depression as causing the fall in the prices does or does not tend to last indefinitely is a question of fact. But the question as to what facts are required to be established in order to show that the cause is only temporary will be a question of law or at least a mixed question of fact and law. [P 155b,h]

Where therefore in a suit for rent by the landlord, the tenant claims a reduction under S. 38, Ben. Ten. Act, on the ground of a fall in the average local prices of staple food crops, the High Court would interfere with finding of the lower Court that the cause for the fall is a temporary one if the finding has been arrived at on reasonings which are not tenable : ('15) 2 A. I. R. 1915 Cal. 345 and ('32) 19 A. I. R. 1932 Pat. 225 (F. B.), *Discussed*. [P 156a]

[Cause when to be said temporary discussed.]

C. P. C. —

('44) Chitaley, S. 100, N. 53, Pt. 1.

(b) Evidence Act (1872), S. 57—World-wide economic depression can be judicially noted.

The Judge is entitled to take judicial notice of a notorious fact like the world-wide economic depression. [P 155c]

*Bankim Chandra Mukherjee and Mukti Pada Chatterjee—*for Appellants.

Panchanan Ghose and Durga Das Roy —
for Respondents.

Judgment. — This appeal is by defendants 1 to 7 in a suit for recovery of arrears of rent of an occupancy holding for the years 1342 to 1345 B. S. Originally the rent of the holding was Rs. 31-2-0 and 7½ maps of paddy per annum. In 1923, on the application of the tenant defendants under S. 40, Ben. Ten. Act, the paddy rent was commuted into money rent and as a result of this commutation the total rent of the holding was settled at Rs. 85 per annum. In the present suit the plaintiff claims rent at Rs. 85 per annum. The defendants claim a reduction of this rent under S. 38, Ben. Ten. Act, on the ground that there has been a fall, not due to a temporary cause, in the average local prices of staple food crops during the currency of the present rent since 1924. In their written state-

ment, para. 6, they ascribe the fall in the price to the world economic depression since 1336 B. S. The relevant portion of S. 38, Ben. Ten. Act, stands thus :

"38 (1). An occupancy raiyat may institute a suit for the reduction of his rent on one or more of the following grounds (1) on the ground that there has been a fall, not due to a temporary cause, in the average local prices of staple food-crops during the currency of the present rent, (2) In any suit instituted under this section the Court may direct such reduction of the rent, as it thinks fair and equitable."

There is no dispute that reduction of rent on the ground stated above may be obtained by way of defence in a suit for recovery of arrears of rent. There is also no dispute that paddy is the staple food-crop of the locality. The learned Munsif who tried the suit upheld the defence claim to the reduction of rent, finding, (1) that there has been a considerable fall in the average local prices of paddy during the currency of the present rent ; (2) that the cause of the fall is not a temporary one.

He compared the average price of paddy for 1930 to 1939 as published by the Government under S. 39, Ben. Ten. Act, with that for the period from 1915 to 1924 and held that the tenants were entitled to a reduction of 1/4th of the rent. As the commutation of the paddy rent took effect from 1330 B. S. he allowed this reduction with effect from 1345 B. S. in view of the provisions of S. 40A, Ben. Ten. Act, according to which a commuted rent was not liable to be reduced for 15 years on the ground of any fall in the average local price of staple food-crops.

On appeal by the plaintiff, the learned Subordinate Judge reversed this decision, and held that the tenants were not entitled to any reduction of rent. The learned Subordinate Judge decided against the tenant on the two following grounds, namely : (1) that the requirements of cl. (1) of S. 38, Ben. Ten. Act, were not satisfied as the cause owing to which the price fell was a temporary one ; (2) that even if the requirements of cl. (1) of S. 38 be taken to be present, the Court is given discretion in the matter by cl. (2) of the section, and in the circumstances of the present case, that discretion must be exercised against the defendants.

The learned Subordinate Judge affirmed the finding of the learned Munsif that there had been a considerable fall in the prices of staple food-crops. He found that there had been this fall since 1931. According to him this fall was due to world-wide economic depression. He, however, took this depression to be a temporary cause relying on the obser-

a vation of Terrell C. J., in 11 Pat. 654¹ at p. 666 to the effect that this economic depression could not be said to have a permanent effect. He also noticed that

"though the prices are still lower than what ruled before the economic depression set in, there has again been some rise in the prices."

He therefore held that the fall in the average local prices could not be said to be 'not due to a temporary cause' within the meaning of S. 38 (1) (b), Ben. Ten. Act.

b As to his second ground for refusing the claim for reduction the learned Subordinate Judge was influenced by what he considered to be the factors taken into consideration in the commutation proceedings. According to him three factors were taken into consideration in settling the rent under S. 40, Ben. Ten. Act, viz., (1) prevailing rate of rent in the locality, (2) average prices of staple food-crops and (3) average yield of the lands. He thought that there was nothing to show when the prevailing rate of rent came into existence and consequently he observed that if this prevailing rate be taken as coming into existence during the years 1891 to 1900, then the average prices of staple food-crops of that period were almost the same as the average prices of the years 1930 to 1939. Next, taking c the average yield of the lands, he found that the present rent of Rs. 85 is a little less than 1/6th of this average yield. He seems to have taken this to be a fair ratio.

Mr. Mukherjee, appearing in support of the appeal before me, contends (1) that the Court of appeal below went wrong in holding that the world economic depression was only a temporary cause; (2) that in exercise of its power under S. 38 (2), Ben. Ten. Act, the Court of appeal below went wrong (a) in its conception of prevailing rent as a factor determining the commuted rent, (b) in its appreciation of d what proportion should a fair rent bear to the average yield, and (c) in its appreciation of the factors actually taken into consideration in the commutation proceeding.

Mr. Ghose, appearing for the plaintiff-respondent, contends (1) that the question whether or not a cause is a temporary one is a question of fact, and is concluded in the present case by the finding of the Court of appeal below. (2) That at any rate the granting of any reduction of rent being discretionary with the Court under S. 38 (2), Ben. Ten. Act, and that discretion in the present case having been exercised by the Court of

appeal below against the defendants, no question of law arises for decision in the present appeal.

As regards the 'prevailing rate' it is difficult to see how the period 1891 to 1900 at all comes in. Sections 31 and 31A, Ben. Ten. Act, indicate what is meant by the expression 'prevailing rate' at any time. Section 40 (4) of the Act also indicates which period would come into consideration for the purposes of commutation of rent in kind to a money rent. The order (Ex. 2) in the commutation proceedings referred to by the learned Subordinate Judge himself shows which period was taken into consideration by the Collector for this purpose. The order shows that it was 1912 to 1921. I do not see why a period like 1891 to 1900 should arbitrarily be taken for comparison in this case. I am not sure if 1/6th of the average gross yield without making any allowance for the costs of cultivation, etc., is at all a very fair test. In any case, as the exercise of the discretion by the learned Subordinate Judge under cl. (2) of S. 38, Ben. Ten. Act, seems to have been very much influenced by his erroneous conception of the factors taken into consideration in the commutation proceedings, I cannot allow his decision in this respect to stand unless I am g satisfied as to the correctness of his decision relating to the requirement of S. 38 (1).

The learned Subordinate Judge has found (1) that there has been a considerable fall in the average local prices of staple food-crops during the currency of the present rent, (2) that the cause of this fall is the 'world economic depression,' (3) that this cause is a temporary one—or cannot be said to be "not a temporary cause" within the meaning of S. 38 (1) (b), Ben. Ten. Act.

There is no dispute that the first two are findings of fact. The question is whether the third is also a mere question of fact and if so, whether the finding on the question arrived at by the Court of appeal below is assailable on any of the grounds open to an appellant in a second appeal.

The word 'temporary' means "lasting or intended to last only for a time," "existing or continuing for limited time," "not of long duration," "transitory," "changing," "lasting for a short time," "not permanent." The word "permanent" also is used in the same S. 38, Ben. Ten. Act. The word does not import something which will continue for ever. It is something lasting or intended to last indefinitely. The more uncertain the result is the more it must be held to come within the

1. ('32) 19 A. I. R. 1932 Pat. 225 : 139 I. C. 191 : 11 Pat. 654 : 13 P. L. T. 377 (F. B.), Nathuni Thakur v. Ram Saran Singh.

a meaning of the word 'permanent': 20 C. W. N. 1157² at page 1158.

The question whether or not any particular cause is calculated to last indefinitely or only for a short time is necessarily a question of fact. There may be different accounts of the determining factors. But these factors must also be some facts, some accounts of what happened. It may be difficult, doubtful or problematical as to which account should be accepted. But its acceptance is not the application of any rule of law. But the question whether the accepted accounts satisfy the requirements of a cause being temporary or

b permanent may be a question of law. Questions of fact and questions of law are no doubt distinct categories involving real differences. But an apparent question of fact may really be a question of law. The question whether the economic depression as causing the fall in the prices does or does not tend to last indefinitely is a question of fact. But the question as to what facts are required to be established in order to show that the cause is only temporary will be a question of law or at least a mixed question of fact and law.

c The learned Subordinate Judge in this case has taken judicial notice of the notorious fact of the world economic depression and has accepted the defendants' case that this depression is the cause of the fall in prices. It is not disputed that the Judge was entitled to take judicial notice of such a notorious fact. Theoretically the need of the Court for information as to such notorious facts is met by the doctrine of judicial notice and this doctrine is recognised in S. 57, Evidence Act. Very little formality need be resorted to in the process of theoretically reminding the Court of what it already knows or of what it is presumed to know.

d In order to characterise the depression as a temporary cause the learned Subordinate Judge mainly relied on certain observations of Terrell C. J. in 11 Pat. 654¹ at p. 666 where the learned Chief Justice is said to have characterised this very depression as a temporary cause within the meaning of this very section, viz., S. 38 (1) (b), Ben. Ten. Act. The learned Chief Justice, however, did nothing of the kind. There he was simply meeting one of the reasons given by Mahammad Noor J., for refusing to take into consideration the world economic depression in determining what would be fair rent under S. 35 of the Act. Mahammad Noor J., said :

2. ('15) 2 A. I. R. 1915 Cal. 345 : 29 I. C. 236 : 22 C. L. J. 42 : 20 C. W. N. 1157, *Krishna Sahai v. Palak Dhari*.

"The learned advocate has relied upon the present economic depression prevailing in the country. First of all, one cannot be sure how long this depression is going to last, and secondly, if this becomes a permanent feature it will be open to the defendants to apply for reduction of rent under the provisions of S. 38, Ben. Ten. Act."

The learned Chief Justice referring to this reasoning of Mahammad Noor J. observed : "The words 'not being due' to a temporary cause" show very clearly that S. 38 would not give relief to the tenant from changes in the proportions due to the economic depression : for from the learned Judge's premise that it cannot be shown that the depression will have a permanent effect, he would be unable in any case to obtain a reduction for this case."

The learned Chief Justice only assumed the premise of Mahammad Noor J. to expose the infirmity in his reasoning. If Mahammad Noor J. wanted to characterise the depression as temporary because one could not be sure how long the depression was going to last then with due respect I would differ from him. If there was this uncertainty about the duration of the depression it would not be temporary within the meaning of the section.

The other fact relied on by the learned Subordinate Judge is that

"during the last two or three years, there has again been some rise in the prices, though the prices are still lower than what ruled before the economic depression."

No doubt this fact may indicate that the price already shows a tendency to rise and such a rising tendency may be evidence of the fact that the cause of the fall is passing away. But the figures after the year 1936 again indicate a fall in the prices. The so-called rising tendency itself might therefore have been due to some temporary cause. The learned Judge seems to have formed his opinion that the world economic depression was a temporary cause on the supposed authority of the case in 11 Pat. 654¹ and on the supposed rising tendency. The Judge has thus indicated the premises of his reasoning and the premises are not correct. There might have been some difficulty in examining his assumption as to the character of the cause had his premises remained inarticulate. But that is not the case here. In my opinion, though the question whether the cause is or is not to last indefinitely is a question of fact, the question whether or not it is temporary is a mixed question of fact and law.

The Judge has not indicated why he characterizes the cause as a temporary one. Is it because the depression itself is a temporary event? Or is it because its influence in the locality is temporary? Or is it because its influence on the price only is temporary?

^a Again he does not indicate what meaning he gave to the word 'temporary.' Is the case temporary because it is not to last for ever? Even when he says it is temporary he relies on a supposed authority which is misread and misunderstood by him, and on a supposed rising tendency which does not in fact exist. In these circumstances I cannot allow this finding to stand. The temporary character ascribed to the event is certainly not a notorious fact. The cause of this depression is yet indefinite and undefined. Its removal is yet beyond any discernible solution. It seems as if it has come to stay indefinitely. The difficulty in characterising the world economic depression itself as a temporary event will best appear from the contradictory plethora of solutions offered on all sides for its removal. "The only lasting step to solve the increasing financial paralysis of the world is the adjustment of all reparations and war debts."

^b This solution was announced by the Basel Experts Committee's Report in December 1931. A year after the cancellation of these supposed causes by the Hoover Moratorium the "Economist" declared in May 1932 that "a year ago it was possible to believe that the lifting of the burden of reparations and war debts would be such a relief to the world that it would turn the tide of depression. That belief is no longer possible; it is abundantly clear that action on a much wider scale is necessary."

^c The "Midland Bank Review" in January 1932 affirmed that the only way out was the way of a rising price level. Keynes in a lecture on 'The World Economic crisis and the way of escape' in February 1932 declared that the only alternative solution to the disappearance of the existing credit system is a world-wide organised inflation. "The way of escape from economic crisis" announced Sir William Beveridge in a Halley Stewart lecture on the same subject in the same month, "was by way of international action to suppress the anarchy of purchasing power and to keep the liberty of production and exchange."

^d A British Liberal Free Trade Manifesto proclaimed that

"the only way to renewed prosperity is the removal of all hindrances to the free exchange of goods and commodities."

The views of American, French and German theorists differed markedly from the British as to the causes of the crisis and its solution. "The causes of this depression lie in much more potent factors than these debts transactions," affirmed the United States reply to the British Note in December 1932. Andrew Mellon, the world's reputed wealthiest man, declared

"I do not believe there is any quick or spectacular remedy for the ills from which the world is suffering,

nor do I share the belief that there is anything fundamentally wrong with the social system."

The major cause of the crisis, according to the French economist, Charles Rist, lay in 'British presumption' in endeavouring to re-establish the pound at par without any adequate economic basis. The French Financier and Politician, Caillaux, in a lecture on the world crisis to the Royal Society of Arts in London in March, 1932 explained that 'the principal cause of the crisis was not the defective working of the monetary mechanism or the distribution of gold, but a superabundance of mechanical appliances.'

According to him the solution of the crisis lay in extended colonial development in Africa.

^f There are some who find a much deeper cause for this depression and reckon this as the result of the deep contradictions of the present epoch. They do not even ascribe this depression to the world war.

"What in 1913 might have still appeared, with whatever contradictions and hardships, as a functioning and elaborately adjusted mechanism of world production, trade and finance, advancing with only slight interruptions to a continuous expansion of production and to ever closer world inter-dependence and inter-relationship, has now revealed itself in the present stage as a system of extreme disequilibrium and discord, with downward trends of production over long periods, with an increasing gulf between productive power and actual production, and with centrifugal tendencies of break-up of closer world relations towards a system of restricted world trade, separate and competing financial bases of unstably related currencies, weakened international division of labour, and intensified warfare of the monopolist block. In fact these tendencies were already present in the germ in 1913; but they have only begun to reveal their full character and effects in the post-war period The fact that seven years after the outbreak of the world economic crisis and four years after the passing of its lowest point these tendencies are still strongly and even in some respects increasingly marked indicates that these are no short-term factors of a temporary, passing disturbance, but are deeply rooted characteristics of the present period."

^h The final report of the World Economic Conference, 1927, (Geneva) observed :

"Immediately after the war many people naturally assumed that the war and the war alone was the reason for the dislocation that emerged in the economic relations of individuals, of nations and of continents. A simple return to pre-war conditions seemed in the circumstances the appropriate objective of economic policy which would be sufficient to cure the current difficulties. It is an instinctive tendency of mankind to turn to the past rather than to the future and, even at a moment when an old order is being displaced, to revert to former ideas and to attempt to restore the traditional state of affairs. Experience has shown, however, that the problems left by the war cannot be solved in so simple a manner."

Oswald Spengler, the German philosopher, ascribes the depression to "the dethronement of politics by economics, of the state by the counting-house, of the diplomatist by the

^a trade union leader. It is here and not in the sequelae of the world war that the seeds of the present economic crisis will be found. This whole crushing depression is purely and simply the result of the decline of state power."

It is thus difficult to characterise the world economic depression as a temporary incident. Of course although it may be permanent elsewhere its influence in a particular locality may cease. It will be for the learned Judge to decide the matter. In the result this appeal is allowed. The judgment and decree of the Court of appeal below are set aside and the appeal is remitted to the Court of appeal below for disposal according to law keeping in ^b view the observations made above. The parties will bear their respective costs in this Court. Further costs will abide the result. Leave to appeal under cl. 15 of the Letters Patent is prayed for and is refused.

R.K.

*Appeal allowed.***A. I. R. (31) 1944 Calcutta 157**

NASIM ALI AND BLANK JJ.

Amode Lal Burman — Appellant

v.

Girija Sankar Chaudhury and others — Respondents.

^c Letters Patent Appeal No. 13 of 1942, Decided on 13th January 1944, against judgment of Henderson J., in Appeal No. 1449 of 1939, D/- 23rd March 1942.

(a) Hindu law — Religious endowment — Private endowment — Property endowed by will to family deity — Minor daughter appointed shebait — During daughter's minority her mother to act as guardian and perform deb-sheba — Mother held competent to accept and did accept gift of property to deity.

^d By his will *R* endowed certain properties to his family deity and appointed his minor daughter as the first shebait. It was also provided in the will that during the daughter's minority his mother would act as her guardian and carry on the deb-sheba. The mother obtained letters of administration with a copy of the will annexed after the death of *R* and carried on the deb-sheba. It was contended that the gift to the deity was not validly accepted by a person competent to accept the gift on behalf of the deity and therefore the properties did not become debatter:

Held that the mother who was appointed guardian of the minor shebait was competent to accept the gift and must in the circumstances be deemed to have accepted it on behalf of the deity. The properties therefore were debatter. [P 158g]

Hindu Law —

('40) Mulla, Page 474, S. 407.

('38) Mayne, Page 922 Para. 790.

T. P. Act —

('43) Chitaley, S. 122 Notes 4, 5a and 7.

('36) Mulla, Page 671 Note: "Donee;" Page 673, Note: "Hindu Law."

(b) Hindu law — Religious endowment — Private endowment — Any five gentlemen of locality empowered to take up management of

endowment in case of misappropriation by existing shebait — Aforesaid gentlemen held ^e competent to sue for declaration that property alienated by shebait was debatter.

A provision in the deed of endowment in favour of the settlor's family deity that any five gentlemen of the locality would be able to take up the management of the deb-sheba and of the endowment in case of any misappropriation by the shebait in control of the endowment is valid and any five gentlemen of the locality would accordingly be competent to sue for a declaration that the properties alienated by the shebait alleging them to be his secular properties were debatter properties. [P 159a]

Hindu Law —

('40) Mulla, Page 479, S. 413.

('38) Mayne, Page 926 Para. 794.

(c) Receiver — Suit by disinterested persons ^f for removal of shebait and for possession of debatter property alienated by him — Shebait removed — Appointment of Receiver of suit property pending appointment of new shebait held not wrong.

R endowed certain properties to his family deity and appointed his daughter as the first shebait and provided in the endowment deed that any five gentlemen of the locality would be able to take up the management of the sheba-puja and of the endowment in case of any misappropriation by the shebait. The shebait having alienated the debatter properties, alleging them to be her own secular properties, five gentlemen of the locality brought a suit for a declaration that the properties alienated by the shebait were debatter, for possession of the properties and for removal of the shebait. The Court dismissed the shebait and appointed a receiver of the suit properties pending the appointment of a new shebait : ^g

Held that the appointment of a receiver of the disputed properties pending the appointment of another shebait could not be said to be wrong in the circumstances of the case. [P159a]

C. P. C. —

('44) Chitaley, O. 40, R. 1 N. 13; N. 14.

('41) Mulla, Page 1114, Note: "When receiver may be appointed."

(d) Limitation Act (1908), Arts. 142 and 144 — Sale of debatter property by shebait in 1916 — Purchaser paying Rs. 2 monthly for sheba-puja of idol and continuing in possession up to 1935 — Suit to recover alienated property on behalf of deity in 1938 — Suit held not barred.

^h *R* endowed certain properties to his family deity and appointed his minor daughter *D* as the first shebait. *D*'s mother *M* was to act as the guardian of *D* during her minority and perform the sheba-puja. *R* died in 1914. In 1916 *M* sold the debatter properties to *S* for meeting expenses of sheba-puja of the idol and for the maintenance and marriage of *D*. Subsequently in 1928 *D* sold the same properties to *T* alleging that she had inherited them from her father. *T* then sued *S* for possession, obtained a decree and got possession in 1935. In 1938 a suit was brought against *T* on behalf of the deity for declaration of the alienated property as debatter and for possession :

Held that as during his possession up to 1935 on the basis of the sale deed from *M*, *S* used to pay Rs. 2 for the sheba-puja of the deity and the suit on behalf of the deity was brought in 1938 it could not be said that the deity was dispossessed or that its possession was discontinued for more than 12 years

- a before the institution of the suit. Therefore the suit brought in 1938 was not barred by limitation.

[P 159b]

Limitation Act —

('42) Chitaley, Arts. 142 and 144 N. 49.

('38) Rustomji, Page 1212 Note : "Adverse possession idol."

Apurbadhan Mukherji — for Appellant.*Bankim Chandra Mukherjee and Ray Bahadur Sanat Kumar Chatterjee* — for Respondents.

- Judgment.** — The property which is the subject-matter of this appeal originally belonged to one Ramdas Mohanta. On 14th April 1914, he executed a will by which he dedicated the disputed property for the sheba-puja of two idols Sree Sree Banku Behari Jieu and Sree Sree Shalgram Shila Thakur. Ram Das died on 12th December 1914. On 10th May 1916, letters of administration with a copy of Ram Das's will annexed were granted to his widow, Golap Sundari Debi. Golap Sundari performed the sheba-puja of the deities for some time. On 12th December 1916, she executed a kobala in favour of one Satish Chandra Choudhury. By this kobala, she transferred the disputed property to Satish, for meeting the expense of the sheba-puja of the idols, for maintenance and marriage of the minor Arun Bala, the daughter of Ram Das. Arun Bala attained majority in the year 1926. On 11th April 1928, she sold the disputed property to defendant 1. In the kobala which she executed in favour of defendant 1, it was stated that she inherited the property from her father. On 18th July 1928, defendant 1 sued Satish for possession of the disputed land. This suit was decreed on 7th July 1933. Defendant 1 got possession of the decretal lands in execution of the decree obtained by him on 11th March 1935. On 17th January 1938, five gentlemen of the locality brought the present suit under the provisions of O. 1, R. 8, Civil P. C., for a declaration that the disputed property was debatter property, for recovery of possession of the disputed property and for other reliefs. Defendant 1 contested the suit. His defences, so far as they are material for the purpose of the present appeal, are (i) that the disputed properties are not debatter properties; (ii) that the plaintiffs have no right to bring the present suit on behalf of the idols; (iii) that the plaintiffs are not entitled to recover possession of the disputed properties from the defendant; and (iv) that the suit is barred by limitation.

The trial Judge as well as the first appellate Court decreed the suit. Defendant 1 filed a second appeal to this Court. This appeal was heard by Henderson J. The learned Judge modified the decrees passed by the trial Court

as well as by the first appellate Court. The direction of the trial Judge as well as of the first appellate Court that the possession of the disputed property should be made over to the plaintiffs was set aside by the learned Judge. He however directed that a receiver should be appointed to take possession of the disputed property pending the appointment of another shebait. Defendant 1 has therefore filed this appeal under Cl. 15, Letters Patent. Four points were urged in support of this appeal: (i) that the Courts below should have held that the disputed property is not debattur property; (ii) that the Courts below should have held that the plaintiffs have no right to sue; (iii) that the order of Henderson J. directing the appointment of a receiver of the disputed property pending the appointment of a shebait is bad in law; and (iv) that the suit is barred by limitation.

The argument in support of the first contention is that the gift to the deities was not validly accepted by a person competent to accept the gift on behalf of the deities. By the will of Ramdas, his minor daughter Arun Bala was appointed first shebait. It was also provided in the will that during her minority her mother Golap Sundari would act as her guardian and carry on the deb-sheba. It is an admitted fact that Golap Sundari obtained letters of administration with a copy of the will annexed after the death of Ramdas. It has been found by the Courts below that after obtaining the letters of administration she carried on the deb-sheba. In fact, in the kobala which was executed by her in favour of Satis Choudhury, she stated that she was selling the property for meeting the expense of deb-sheba and for certain other necessities. There cannot be any doubt therefore that she was competent to accept the gift on behalf of the deities. It must therefore be held that the disputed properties are debattur properties. It was also contended on behalf of the appellant that the disputed properties were made secular by the consent of the widow and the daughter of Ram Das. The final Court of fact however has found that there was no satisfactory proof that the disputed properties were converted to secular properties by the consensus of the members of the family of Ram Das. We therefore hold that the disputed properties were not converted to secular properties by the consensus of the members of the family of Ram Das.

As regards the second point, it appears from the will of Ram Das, that any five gentlemen of the locality would be able to take up the management of the sheba-puja and of the en-

a dowment in case any misappropriation is done by the person in control of the endowment. Arun Bala who was appointed shebait committed breach of trust when she transferred the disputed properties alleging that she got these properties by inheritance from her father and that they were her secular properties. The plaintiffs are admittedly five gentlemen of the locality. They are therefore entitled to bring the present suit. As regards the third point, in view of the events that have happened in the present case, we are not prepared to say that the learned Judge was wrong in appointing a receiver of the disputed properties pending the appointment of another shebait. As regards the fourth point, it appears that Satish Choudhury, so long as he was in possession of the disputed properties on the basis of his purchase from Golap Sundari, used to pay Rs. 2 per month for the sheba-puja of the deities. Satish was in possession up to 11th March 1935. The present suit was instituted on 17th January 1938. It cannot be said therefore that the deities were dispossessed, or that their possession was discontinued for more than 12 years before the institution of the present suit. The Courts below were therefore right in holding that the suit is not barred by limitation. c The appeal accordingly fails and is dismissed with costs hearing fee two gold mohurs.

G.N. *Appeal dismissed.*

A. I. R. (31) 1944 Calcutta 159

RAU AND BISWAS JJ.

Ashutosh Sarkar — Plaintiff —
Appellant

v.

Corporation of Calcutta — Defendant —
Respondent.

Appeal No. 1252 of 1940, Decided on 16th August 1943, from appellate decree of Addl. Dist. Judge, Third Court, 24-Parganas, D/- 12th June 1940.

a Calcutta Municipal Act (3 of 1923), Ss. 363, 143 and 144—Unauthorised structure completed — Owner letting out portion of house and occupying rest—Occupier's name not mentioned in book kept under S. 143—Order under S. 363 without notice to occupier held ultra vires.

After completing an unauthorised structure in a portion of his house the owner let out that portion and himself occupied the rest. The occupier's (tenant's) name was not entered in the book kept under S. 143. The Magistrate passed an order for demolition of the unauthorised structure without notice to the occupier :

Held that although under S. 144 (3) the occupier was not entitled to any notice made out in his own name but S. 144 (3) did not deprive him of the right to be given an opportunity of being heard otherwise than by notice in his own name, for example by a general notice to all owners and occupiers affixed on some conspicuous part of the premises in much the same way as provided in S. 504 (c). As no such

opportunity was given to him the order of demolition under S. 363 was ultra vires. As the deviation from the sanctioned plan was slight full opportunity ought to have been given to both the owner and the occupier. [P 160b,c]

S. M. Bose (Advocate-General), Surajit Chandra Lahiri and Nikhil Chandra Talukdar —
for Appellant.

Atul Chandra Gupta and Krishnalal Banerji —
for Respondent.

Rau J.—This is an appeal by the plaintiff in a suit for an injunction to restrain the Calcutta Corporation from demolishing a portion of a house said to have been constructed in violation of the plan sanctioned by the Corporation. The plaint also contained a prayer :

"If necessary, for a declaration that the order of demolition passed by the Magistrate on 16th September 1935, is a nullity."

One Tarak Chandra Das is the owner of the house in question being premises No. 18, Bihari Doctor Road. The unauthorised structure was made between 1931 and 1933. In June 1934, that is to say, after the structure had been completed, a portion of the house was let out by the owner Tarak Chandra Das to the plaintiff Ashutosh Sarkar. We may mention that the owner himself occupies another portion of the house. In September 1934, the Corporation applied to the Magistrate under S. 363, Calcutta Municipal Act, for a demolition order. On 16th September 1935, the Magistrate made an order directing the Corporation to demolish the structure and he made the order without giving the occupier Ashutosh Sarkar an opportunity of being heard in defence. The owner Tarak Chandra Das then brought a suit for an injunction against the Corporation. The trial Court dismissed it on 18th May 1936. There was an appeal to the District Judge which was dismissed on 4th August 1937, and a further appeal to the High Court which was dismissed on 10th August 1938. A week later, that is to say, on 17th August 1938, apparently upon seeing a newspaper report of the High Court's decision the occupier Ashutosh Sarkar brought the present suit. It was decreed by the trial Court but dismissed by the District Judge on appeal. Hence this second appeal.

The point taken before us is that the Magistrate's order of 16th September 1935, was without jurisdiction because he did not give the plaintiff, who was an occupier of the building, full opportunity or indeed any opportunity of adducing evidence and of being heard in his defence as required by proviso (a) to S. 363. The proviso states that the Magistrate shall not make any order under the section

a "without giving the owner and occupier of the building to be so demolished full opportunity of adducing evidence and of being heard in his defence."

It is common ground that the plaintiff is an occupier, although not entered as such in the Corporation's assessment book kept under S. 143. It is also common ground that no notice or intimation of any kind was given to him before the demolition order was made. The Corporation however contends that no notice or intimation was necessary in this particular case because S. 144 (3) provides that no owner or occupier whose name is not entered in the assessment book shall be entitled to object that any notice of any kind required by the Act to be served on the owner or occupier of any land or building has not been made out in his own name. We cannot accept this contention in its entirety. Undoubtedly under S. 144 (3) the plaintiff is not entitled to any notice made out in his own name but the sub-section does not deprive him of the right to be given an opportunity otherwise than by notice in his own name, for example by a general notice to all owners and occupiers affixed on some conspicuous part of the premises in much the same way as provided in S. 504 (c). No such opportunity was given to him. A demolition order is a serious matter for the occupier no less than for the owner and particularly where, as in the present case, the deviation from the sanctioned plan was slight, full opportunity ought to have been given to both.

c We notice incidentally that according to D. W. 1, an officer of the Corporation, the name of a tenant of a part of a house is never recorded in the assessment book when the owner himself also occupies a portion of it. The Corporation can hardly be permitted to adopt such a practice and then to contend that because the tenant is unrecorded, he is not entitled to any notice or intimation under the Act. The plaintiff in the present case came on the premises after the unauthorised structure had been completed and before the Corporation moved the Magistrate for a demolition order. In these circumstances we allow the appeal to this extent that the order of the Magistrate made on 16th September 1935 will be declared ultra vires. This will not prevent the Corporation from proceeding afresh in the matter in accordance with the law. The Corporation will pay the appellant costs both in this Court and in the Courts below.

Biswas J.—I agree.

G.N.

Appeal allowed.

A. I. R. (31) 1944 Calcutta 160

HENDERSON J.

Dula Mia — Accused — Petitioner
v.

Dacca Municipality—Opposite Party.

Criminal Revns. Nos. 328 and 329 of 1943, Decided on 28th June 1943.

(a) Words and phrases—Ferry—Meaning of (*Quære*).

The term "ferry" whether connotes (1) carrying persons from a fixed point from one bank of a river to a fixed point on the other and (2) charging a fixed toll. [P 160g,h]

(b) Bengal Municipal Act (15 of 1932), S. 198 —Keeping does not include plying.

The word "keeping" does not include the word "plying." They are really totally different things. [P 161b]

Ajit Kumar Dutta and S. C. Talukdar —

for Petitioner.

Probodh Chandra Chatterjee — for the Crown.

Order.—The petitioners are two boatmen. They have been convicted for violating the provisions of S. 198, Bengal Municipal Act. The prosecution is at the instance of the Dacca Municipality. Their complaint is due to the fact that the activities of the two petitioners and other persons seriously interfered with the profits of the two lessees of the Municipal Commissioners. The section prohibits the keeping of ferry boats within two miles of a municipal ferry without the sanction of the commissioners. It is not disputed that neither of the petitioners has obtained such sanction. The prosecution, therefore, had to establish, firstly that the boats of the petitioners are ferry boats, and secondly, that they were kept within two miles of the municipal ferry.

On the first point Mr. Dutta contended that there is no evidence that the boats in question are ferry boats. The term "ferry," has not been defined in the Act. Mr. Dutta argued that it connotes (1) carrying persons from a fixed point from one bank of a river to a fixed point on the other and (2) charging a fixed toll. Accepting this definition as sound I am satisfied that there was evidence upon which the Magistrate could find that the boats in question are ferry boats.

It remains to consider whether there was evidence that the petitioners kept them within two miles of the municipal ferry. The judgment of the learned Magistrate on this point is not very clear. Mr. Chatterjee appearing on behalf of the Crown conceded that the evidence only amounts to this that there was mere casual mooring in connexion with setting down and picking up passengers in the course of plying the boats. I should find it difficult to say, for example, that a motor

a bus plying on a definite route is kept at every stop where passengers are picked up or set down rather than in the garage to which it is returned at the end of the day. Mr. Chatterjee, however, contended that "keeping" is a wider term than and includes "plying."

In this connexion he relied upon the case in 27 Cal. 317.¹ That case involved the construction of Ss. 155 and 156 of Act 3 of 1884. I must confess that I am glad that I have not been called upon to construe the former section. I should find it difficult to say whether the words "within a distance of two miles, etc." qualify the word "keep" or the words b "for the purpose of plying for hire." If I have understood the judgment correctly the learned Judges adopted the latter construction. At any rate, the decision does not help in the construction of the present section which is differently worded. In my judgment it is impossible to say that the word "keeping" is wider than and includes the word c "plying." They are really totally different things. I have been through the record and I am satisfied that there is no evidence where the petitioners kept the boats within the meaning of the section. The rules are accordingly made absolute. The convictions and sentences are set aside and the fines, if paid, will be refunded.

R.K.

Rules made absolute.

1. (1900) 27 Cal. 317 : 4 C. W. N. 348, Government of Bengal v. Senayat Ali.

A. I. R. (31) 1944 Calcutta 161

ROXBURGH AND BLANK JJ.

Nani Bai Baishyani w/o Lakshmi Chand Agarwalla — Decree-holder — Appellant

v.

d *Maliram Agarwalla and another — Respondents.*

Appeal No. 61 of 1942, Decided on 4th August 1943, from original order of Sub-Judge, Nadia, D/- 13th February 1942.

Bengal Agricultural Debtors Act (7 of 1936), S. 34—Application under Act—Maintainability of—Debt Settlement Board alone can decide—Civil Court cannot ignore notice under S. 34.

The Debt Settlement Board alone has jurisdiction to decide the question as to the maintainability of the application made to it under the Act. It is not open to the civil Court to go behind the notice under S. 34 and ignore it on the ground that the application to the board was not maintainable : Civil Revn. No. 557 of 1943 and Civ. Revn. No. 668 of 1943, *Rel. on.* [P 161h ; P 162a,c]

Binayak Nath Banerji — for Appellant.

Abinash Chandra Ghose — for Respondents.

Roxburgh J. — This is an appeal against an order of the Subordinate Judge, Nadia, refusing to ignore a notice under S. 34, Bengal Agricultural Debtors Act, at the instance of the decree-holder. The Court has directed the decree-holder to move the Debt Settlement Board at Shikarpur which issued the notice to vacate the order. It appears that the execution proceedings with which we are concerned were first delayed by an application of the judgment-debtors to the Debt Settlement Board at Durgapur. That application was dismissed, and on appeal, the Sub-divisional Officer as Appellate Officer stated that it was absolutely clear that the debtor appellants had been attempting to use the provisions of the Act with a view to defeat the creditors. He accordingly upheld the decision of the Durgapur Debt Settlement Board. Thereafter the judgment-debtors filed a petition under S. 36, Bengal Money-lenders Act, which in turn was dismissed. Next a notice was obtained under S. 34, Bengal Agricultural Debtors Act, staying the proceedings—that notice having been apparently issued as the result of a petition of a creditor before the Durgapur Debt Settlement Board. The proceedings were stayed. Eventually the notice was withdrawn on receipt of the proceedings of the Appellate Officer, Nowgong, who rejected the petition filed by the judgment-debtors to that officer. The last stay of proceedings has been at the instance of another creditor—this time on an application made to the Debt Settlement Board at Shikarpur and the decree-holder's attempt to have the second notice under S. 34, Bengal Agricultural Debtors Act, ignored has failed. Hence this appeal.

In our opinion, the order of the learned Subordinate Judge is correct and the proper remedy of the decree-holder in the case is to move the Shikarpur Board to have the notice cancelled on rejecting the application of the creditor on the ground that such application is not maintainable under the provisions of S. 8 (2), Bengal Agricultural Debtors Act. The question whether a civil Court may ignore a notice received under S. 34 of the Act on the ground that the application on which such notice is passed is not maintainable before the board has been considered by this bench in an unreported case—Civ. Revn. No. 557 of 1943,¹ and it was held that the Debt Settlement Board has jurisdiction to decide the question as to the maintainability of the application, and, consequently, the civil Court cannot ignore

1. Civ. Revn. Case No. 557 of 1943, decided on 25th June 1943, *Jadu Mandalani v. Sm. Sarojini Choudhurani.*

a | a notice issued by a board pending such consideration or even if the Court takes a different view of the maintainability from that taken by the board. A similar view was adopted in Civ. Revn. No. 668 of 1943 in the judgment dated 27th July 1943, by a Division Bench presided over by Mukherjea J., to which one of us was a party. The learned advocate for the appellant has endeavoured to distinguish the present case on the ground that here we are concerned with an application made by a creditor after a previous application had been made by a debtor, and he points out that under cl. (2) of S. 8 of the Act such an application may not be made. In our opinion, though the wording of S. 8 (2) differs from that of S. 8 (5), we do not think that this affects the view already expressed in the previous cases that it is for the board to decide whether it can deal with the application or not. On receipt of the application the board will issue notices as required on the necessary parties and will hear them; it can issue a notice under S. 34 of the Act in respect of the debts mentioned in the application staying proceedings in Courts pending decision. No doubt if the facts are as stated, the only order which the board can pass in the present case when the facts are brought to its notice is to reject the application, but we think that it is for the board to do so and not for the Court to go behind the notice under S. 34 of the Act and ignore it on the ground that there was no application to the board because the creditor was not entitled to move it.

A question of fact is involved for decision by the board. Though no doubt it is a simple one and one easy to establish, nonetheless, if the Court ignores a notice under S. 34, Bengal Agricultural Debtors Act, it will be in effect giving a decision against the creditor who has made the application, holding that he was not entitled to do so, and the decision will be made in a proceeding to which he was no party though he may be affected by it.

The facts certainly go to show that the judgment-debtors in this case are conspiring with bogus creditors to delay the present execution proceedings. The fact, however, that the provisions of the Bengal Agricultural Debtors Act may be abused in this way appears to be no reason for us to hold otherwise than as we have previously held that the jurisdiction in these matters lies with the board. It may be that the abuse indicates that it would be very useful if there were included in the provisions of the Act some form of penalty on the lines of S. 250, Criminal P. C., for punishing those responsible for

frivolous and vexatious applications. The result is that this appeal is dismissed. In the circumstances, we make no order as to costs.
G.N. *Appeal dismissed.*

A. I. R. (31) 1944 Calcutta 162

BISWAS AND BLANK JJ.

Ishwar Chandra Pal — Defendant 4 — Appellant

v.

Pritilata Biswas w/o Ramesh Chandra Biswas — Plaintiff — Respondent.

Appeal No. 1631 of 1939, Decided on 15th April 1943, from appellate decree of Sub-Judge, First Court, Sylhet, D/- 10th July 1939.

(a) Bengal Landlord and Tenant Procedure Act (8 of 1869), S. 27 — Suit for possession on declaration of title — S. 27 does not apply.

A suit to recover possession on declaration of title does not come within the ambit of S. 27. [P 163c]

(b) Sylhet Tenancy Act (Assam) (11 of 1936), Sch. 2, Art. 3 and S. 208—Raiyat dispossessed by landlord before Act—Suit to recover possession — Limitation.

Where a raiyat was dispossessed by the landlord before the Act came into force the special period prescribed by the Act does not apply to a suit by the raiyat against the landlord to recover possession of his holding. The limitation for such a suit is 12 years under the Limitation Act from the date of the accrual of the cause of action, i. e., the date of dis- possession unless the suit can be brought within the terms of S. 27, Bengal Landlord and Tenant Procedure Act, 8 of 1869 : 19 I. C. 793 (Cal.) and (14) 1 A. I. R. 1914 Cal. 806 (F.B.), *Rel. on.* [P 163e]

Hemendra Kumar Das and Jyotish Chandra Dutta — for Appellant.

Atul Chandra Gupta, Satyendra Kishore Ghose and Narmada Kumar Gupta — for Respondent.

Judgment.—The short point which arises in this case is one of limitation. The question is whether the suit is barred by the special law of limitation under the Sylhet Tenancy Act (Assam Act 11 of 1936). The facts which it is necessary to state are shortly these: One Inatulla held an occupancy holding which, upon his death, devolved upon his heirs, namely, his widow, three sons and a daughter. Defendant 4, the appellant before us, was admittedly the sole landlord of the holding. In November 1931 he claims to have purchased the interest of all the heirs of Inatulla. It has been found, however, by the Courts below that Inatulla's daughter did not join in the conveyance and that her interest consequently did not pass. It is further found that another heir Marfat, the son of Inatulla's third son, was a minor at the time and his interest also could not, therefore, be conveyed to the defendant. The position consequently was that although defendant 4 purported to purchase the entire holding, he

a acquired title in respect only of the interest of the heirs of Inatulla other than Marfat and the daughter. All the same, it is found that he took possession of the entire holding. On 8th December 1937, that is about six years later, the plaintiff purchased a 3 annas 7½ pies share from the said Marfat who is pro forma defendant 2, and from pro forma defendant 3 who is the son of Inatulla's daughter since deceased. The appellant's contention was that the plaintiff did not acquire any title by her purchase. The plaintiff accordingly brought the present suit in which she asked for a declaration of her title and for b recovery of possession.

It was contended on behalf of defendant 4 who alone contested the suit, that as the Sylhet Tenancy Act prescribes two years' limitation for a suit to recover possession of land claimed as a raiyat where the plaintiff has been dispossessed by the landlord, the present suit was barred as having been instituted more than two years after the date of dispossession. There is no question here that the dispossession took place in November 1931 — the date of the defendant's purchase. It is also not disputed that before the Sylhet Tenancy Act came into force, the limitation c for a suit to recover possession was 12 years unless the suit could be brought within the terms of S. 27 of the Bengal Act, 8 of 1869. Section 27 of that Act has, however, been the subject of judicial construction in numerous cases, and it has been definitely held that a suit to recover possession on declaration of title does not come within the ambit of that section. In the present case, it is not open to the defendant to suggest that the declaration of title was asked for only for the purpose of getting round S. 27. In his written statement the defendant had himself questioned the title of the plaintiff, showing that it was, therefore, necessary for the plaintiff to ask for establishment of her title. Section 27 being out of the way, the only limitation applicable would be that under the general law contained in the Limitation Act. That provides a period of 12 years from the date of dispossession. It follows, therefore, that unless the Sylhet Tenancy Act could be made to apply, the suit would be in time.

The Courts below have held, relying on the authority of two decisions of this Court in 17 C. W. N. 889¹ and 41 Cal. 1125² — the latter

being the decision of a Special Bench — that as the cause of action had accrued before the Sylhet Tenancy Act came into force, the special limitation prescribed by that Act could not affect the suit to enforce that cause of action. We think this view was quite correct. As the Special Bench pointed out :

"It is an established axiom of construction that though procedure may be regulated by the Act for the time being in force, still the intention to take away a vested right without compensation or any saving, is not to be imputed to the Legislature, unless it be expressed in unequivocal terms."

They go on to say that a right of suit is a vested right. The only question, therefore, which arises is whether there is anything in f the Sylhet Tenancy Act which can be said to show anything to the contrary. Mr. Das is unable to rely on any other provision than that contained in sub-s. (2) of S. 1. But this merely says that the Act shall come into force on a date to be notified by the Local Government. We do not and cannot read this to mean that the Legislature intended to postpone the operation of the Act to a definite date and it is not accordingly possible to hold that any period of respite, if one might use that expression, was intentionally given by the Legislature in passing this Act in order to mitigate any hardship that might other- g wise arise in enforcing causes of action which had already accrued. The fact that the executive Government actually brought the Act into operation after a certain interval cannot, in our opinion, be taken into account in this behalf. The contrary intention, as pointed out by the Special Bench, must be the intention of the Legislature and must be expressed in unequivocal terms. Both these conditions are wanting in the present case, and we must, therefore, hold that the suit will not be governed by the Sylhet Tenancy Act. In this view of the matter, the appeal fails h and must be dismissed with costs. We desire to add that the question of defendant 4's right as landlord to pre-empt the holding under the provision of Sylhet Tenancy Act is left open.

G.N.

Appeal dismissed.

A. I. R. (31) 1944 Calcutta 163

B. K. MUKHERJEA AND PAL JJ.

Gobinda Chandra Ghosh alias G. Ghosh and another — Appellants

v.

Abdul Majid Ostagar and others —

— Respondents.

Appeal No. 197 of 1939, Decided on 22nd June 1943, from original decree of Dist. Judge, Dacca, D/- 7th July 1939.

1. ('13) 17 C. W. N. 889 : 19 I. C. 793 : 17 C. L. J. 316, *Manjhoori Bibi v. Akel Mahumed*.

2. ('14) 1 A. I. R. 1914 Cal. 806 : 24 I. C. 37 : 41 Cal. 1125 : 19 C. L. J. 549 : 18 C. W. N. 804 (S. B.), *Gopeswar Pal v. Jiban Chandra Chandra*.

(a) Mahomedan law—Wakf—Formal declaration of wakf is sufficient—Burning lamps in mosque is recognised as religious or pious.

Where the settlor has made a formal declaration of endowment and has used the expression "wakf" it indicates that he relinquishes the properties which are consigned to the custody of God. If the object of the wakf is the burning of lamps in the mosque it is one of the objects recognised as religious and pious under the Mahomedan law: 33 All. 400, *Rel. on.*

[P 169e]

(b) Mahomedan law — Wakf — Formal declaration — It can be shown that wakf was not intended to be acted upon—Delivery of possession to mutwalli is not necessary — Fact that wakif arrogated to himself function of mutwalli, though several were named or that after wakif's death, his heirs dealt with property as personal does not show wakif's intention not to act upon wakf.

It is open to the persons challenging a wakf to show that the wakf even though formally declared was never intended to be acted upon. For that purpose, the Court has to look primarily to the surrounding facts and circumstances as well as to the conduct of the wakif himself after the wakfnama has been executed. The question whether the wakfnama was in fact acted upon or not is not strictly relevant except as a means of and by way of step for determining that intention : ('32) 19 A.I.R. 1932 Cal. 93, *Rel. on.*

[P 169f]

As a matter of law no delivery of possession of the wakf properties to mutwalli is necessary for the purpose of completing the wakf according to the view taken in Bengal which follows the view of Abu Yusuf. The fact that the wakif appointed different mutwallis from amongst his descendants at different times, really intending that all these arrangements would take effect after his death, and so long as he was alive he arrogated to himself the function of a sole de facto mutwalli does not go to show that the wakf was not acted upon. So also the fact that after the death of the wakif his heirs began to deal with the properties as their own personal properties cannot be relied upon for the purpose of showing what the real intention of the wakif was. [P 169g; P 170a, h]

(c) Deed—Construction — Apparent transaction must be presumed to be real — Party contesting must prove otherwise—Mere suspicion is not enough.

An apparent transaction must be presumed to be real unless the contrary is established, and the onus of establishing the contrary is on the person who asserts that the transaction is not what it seems. That there are undoubtedly certain matters which might legitimately create suspicion in the Judge's minds and give rise to doubts is not sufficient because the decision of the Court must rest not upon suspicion but upon legal evidence. [P 170h]

(d) Mahomedan law—Wakf—Validity—Wakf held not illusory and was not invalid.

The settlor made wakf of his properties consisting of the dwelling house and the adjacent lands for the purpose of rendering certain services to the mosque. The dwelling house was intended to be used as a place of residence by the mutwallis and they could only derive some small income from the vacant lands. Out of this income, they were to defray the expenses of the mosque and the rest they were entitled to appropriate as mutwallis. There was nothing to show that the vacant lands could fetch a large income, and that only an insignificant part would be required for

services of the mosque and the bulk of it could be absorbed by the descendants of the founder. Nothing was left to the descendants of the founder as such. Whatever they got they got as mutwallis :

Held that the trust was not illusory and the property was not really given to the heirs with a charge for religious expenses mentioned in the deed.

[P 171f, g]

(e) Civil P. C. (1908), S. 92 — After sanction defendant added as party—Addition if changes nature or scope of suit, sanction previous to his addition is necessary—Suit is otherwise not maintainable.

Once a suit is validly commenced after obtaining sanction as is necessary under S. 92 no fresh sanction is necessary at a further stage of the suit if the amendment of the plaint or the addition of the party does not alter the nature of the claim in the suit, but when such amendment or addition of party does change the nature or scope of the suit, a fresh sanction is required. If as against the added defendant there is a totally different cause of action it certainly extends and alters the scope of the suit, and if no sanction has been obtained previous to the new defendant being added as a party to the suit, so far as the added defendant is concerned, the suit cannot be held to be maintainable: 36 Bom. 168, *Rel. on.*

[P 172g, h]

C. P. C. —

- ('40) Chitale, S. 92, N. 25 Pts. 6 to 9.
- ('41) Mulla, Page 329, Pts. (e) to (g).

(f) Civil P. C. (1908), S. 92—Suit against third person as trespasser is not contemplated by S. 92.

Where the trustee in breach of the trust has improperly alienated the trust property to a stranger and the essence of the plaintiffs' claim against such alienee is that he is a trespasser and the property of which he is in possession should be restored to the new trustee that is to be appointed by the Court, such relief is outside the scope of a suit under S. 92 because a relief against a third party is not one of the reliefs specified in S. 92 and cannot be brought within the words "such further or other relief" which should be construed ejusdem generis with the previous clauses: *Case law referred.* [P 173g; P 174a, b]

C. P. C. —

- ('40) Chitale, S. 92, Notes 2 and 28.
- ('41) Mulla, Pages 339 and 341.

(g) Civil P. C. (1908), S. 92—Wakf—Property is of deity — Alienee from mutwalli except in exceptional circumstances is trespasser — Suit for ejectment of alienee is not governed by S. 92.

Both in Hindu debuttar as well as in wakf under the Mahomedan law, the full legal and beneficial ownership of the property is in the deity or in the wakf. The mutwalli or the shebait is a mere manager who has not the legal estate in him as in the case of an English trustee. The transferee from the mutwalli therefore does not get the legal estate and the question whether he purchases with notice of the wakf or not is really immaterial. The mutwalli has no right to transfer the property except in certain exceptional circumstances recognised by the Mahomedan law, and the fact that the purchaser is a bona fide purchaser for value without notice would afford no protection to him. If the wakf character of the property is established, the transferee becomes a trespasser pure and simple who has purchased from one person property belonging to another and the

a proper remedy against him would be an action in ejectment. S. 92 has been held to be applicable to shebaitis or mutwallis, not because they are trustees in the English sense of the word, but because in view of the obligations and duties resting upon them. They are liable as trustees in the general sense for maladministration of the trust fund or trust property: ('22) 9 A.I.R. 1922 P. C. 123, *Rel. on.*

[P 174h; P 175a,b]

b If the purchaser had taken upon himself the duties of a trustee and became a trustee de son tort, relief against him under S. 92 might certainly be claimed. But when he has purchased the property not as wakf property, but as the personal property of the mutwalli and purports to hold it adversely to the trust, he is in the position of a rank trespasser and not that of a trustee either actual or constructive. It would be disastrous to the interests of the wakf estate itself if for the recovery of trust property in such circumstances a suit under S. 92 is deemed to be necessary. The principles of English law of a constructive trust are not at all applicable to such cases, but even if they are deemed to be applicable, the transferees from mutwalli cannot be held to be constructive trustees on these principles, which could make them proper parties to a suit for execution and administration of a trust which S. 92 contemplates.

[P 175c,d; P 176h]

C. P. C. —

('40) Chitaley, S. 92, Notes 2 and 28.

('41) Mulla, Pages 339 and 340.

(h) Practice — Party — No relief available against party — Such person is not necessary party.

c It is opposed to all principles to make a decision in the presence of a particular party with a view to make him bound by it when admittedly no relief can be given against him. [P 177c]

(i) Civil P. C. (1908), S. 92 — Wakf — Public wakf — Reliefs specified asked — S. 92 applies (Per Pal J.).

A public wakf is a trust for public purposes of a charitable or religious nature within the meaning of S. 92 and if the reliefs specified in the section are claimed with reference to a wakf, the section applies: ('28) 15 A.I.R. 1928 P.C. 16, *Referred.* [P 186g]

C. P. C. —

('40) Chitaley, S. 92, N. 2.

('41) Mulla, Page 337.

d Dr. Basak, Rajendra Chandra Guha, Prakash Ch. Pakrashi and Nirmal Ch. Nandy — for Appellants.

Atul Chandra Gupta and Abul Quasem II — for Respondents.

B. K. Mukherjea J.—This appeal is on behalf of defendants 2 and 3 in a suit commenced by the plaintiffs under S. 92, Civil P. C. The suit relates to certain immovable properties situated at Rai Sahib Bazar in the town of Dacca, with regard to which one Khidir Buksh Khansama was alleged to have made a wakf for the upkeep of a mosque built by him. The plaintiffs are the members of the Mahomedan public who are interested in the mosque, two of them being the brother's grandsons of Khidir Buksh, and the suit was commenced with the sanction of the Collector of Dacca

as contemplated by S. 93, Civil P. C. According to the plaintiffs the wakf was created by a towliatnama executed by Khidir Buksh on 9th May 1851, by which the properties specified in Sch. A of the plaint were dedicated to the mosque which is itself described as property No. 1 of Sch. B. Another person named Miran who lived in the same locality is said to have dedicated a plot of land to the services of the same mosque by a deed executed on 25th June 1866, and this property has been described in Sch. C of the plaint. The defendants to the suit are three in number; defendant 1 is Akhtar Nabi, a daughter's son of Khidir Buksh who according to the plaintiffs became the sole mutwalli of the wakf estate by reason of certain transactions which took place between the heirs of Khidir Buksh after the death of the latter. Defendants 2 and 3 are the present possessors of the properties which are alleged to have been dedicated to the mosque by Khidir Buksh by the towliatnama of 1851. They got them by several conveyances executed by defendant 1 as well as by certain other transferees from the heirs of Khidir Buksh. Defendant 3 is a deity named Ganesh Deb and is represented by defendant 2 as its shebait.

To appreciate the contentions of the respective parties it will be convenient I think to give a brief narrative of the main events and transactions as they appear on the record in chronological order. Khidir Buksh Khansama, the alleged wakif, was a man of moderate means living at Rai Sahib Bazar in the town of Dacca. Sometime before 1851 he had built a mosque on a small plot of land contiguous to his dwelling house. On 9th May 1851, he executed a document which is described as a towliatnama and has been marked Ex. 1 in this case. By this document he purported to make a wakf of his self-acquired pucca building and lakheraj land for the lighting of lamps of the mosque mentioned above. At that time he had no son and he made his wife Rostam Bibi alias Dana Bibi and his daughter Mohorjan mutwallis of the wakf, with a further provision that all his sons and grandsons as well as his daughter's sons and grandsons who might be born in future would become mutwallis and as such would be entitled to reside in the dwelling house and perform the work of lighting the mosque. Although the wife and daughter of Khidir Buksh were appointed mutwallis it is not disputed that there was no delivery of possession of the wakf properties in their favour and they never purported to exercise their function as mutwallis of the wakf. On 17th

a December 1874, a second towliatnama, (Ex. Z-1) was executed by Khidir Buksh. At that time two sons were born to him and by this deed he purported to remove both his wife and daughter from their office as mutwallis and appoint his two sons, Kasim and Mohammad, mutwallis in their place. The material portion of this document reads as follows :

b "The said two mutwallis being owners in possession of the brick built havelli of the said wakf property described in the schedule below down to their sons, grandsons and other heirs in succession, shall personally reside therein, let out the same on rent and realise rent from the lessees, induct tenants in the wakf land appertaining to the same and eject them therefrom and make realisations of rents etc. from them and by residing in the Masjid shall do repairs thereto, give lights etc. therein and shall either appoint Mowazzin and Khutib thereof or do the duties of Mowazzin and Khatib etc., themselves, and shall do all the necessary acts, etc., relating to the said Masjid and shall themselves appropriate the savings from the income and usufruct of the said wakf property."

c This towliatnama was subsequently revoked by Khidir Buksh and a third one was executed by him on 27th May 1884, (Ex. 3). It appears that between the dates of the second and the third document one of his two sons namely Mohammad had died. By this deed all the heirs of Khidir Buksh including his wife, Danna Bibi, his two daughters, Mohorjan Bibi and Kulsom Bibi, one Ismail a grandson by a predeceased daughter and his existing son Kasim were appointed mutwallis. The wakf property was divided into two portions; one was the residential portion with regard to which provisions were made for separate allotment of specific rooms to the mutwallis separately where they were to reside after the death of Khidir Buksh and the other portion which consisted of vacant land was to remain in possession of the mutwallis jointly. They were to settle tenants on that portion, make orchards etc. and out of the income of the same repair the mosque and do all other duties in connexion with the same. The surplus income would go to the mutwallis in equal shares. It is not disputed that none of the mutwallis mentioned above did anything in connexion with the wakf properties so long as Khidir Buksh was alive, and the latter continued to perform services to the mosque as he had been doing from before. The exact date of death of Khidir Buksh is not known but it is probable that he died sometime in 1894 or 1895. Kasim, his son followed him soon after and then Rustom Bibi, his wife died. In 1897 the surviving heirs of Khidir Buksh were his two daughters Moharjan and Kulsom, Hafez Ahmadulla, a son of

Moharjan, and Ismail and Abdus Samad the two grandsons by his predeceased daughter Mariam. On 12th January 1897, there was a deed of family settlement executed by all these heirs of Khidir Buksh by which the properties left by the latter including the alleged wakf properties were partitioned in a certain way. This document is marked Ex. B. Under it Kulsom got five annas share in all the properties of Khidir Buksh and another five annas share was given jointly to Ismail and Abdul Samad. The remaining six annas share remained with Moharjan and her son Hafez Ahmadulla. The mother got three annas 18 gds. and odd and the son got the remaining 1 anna 2 gds. and odd share. Paragraph 4 of the document reads as follows :

"According to the shares allotted to us now we shall each take the profits due to our respective shares and possess and use (the land) and repair the building and defray the expenses of lighting the lamps of the mosque and pay the municipal taxes and if there be any litigation we shall pay the expenses thereof in equal shares."

Thus the properties comprised in the Towliatnama of Khidir Buksh were treated by his heirs as purely personal properties except that they recognised it as one of their duties to defray the expenses of lighting the mosque. In 1904 Hafez Ahmadulla mortgaged his share in the alleged wakf property to one Radhika Saha to secure an advance of rupees 600 (*vide* Ex. K). On 26th July 1908, Meherjan transferred her share in all the properties left by Khidir Buksh which she got under the deed of settlement referred to above to her son Hafez Ahmadulla (*vide* Ex. X) and the latter thus acquired a 6 annas share in all the properties. A portion of these properties including the wakf property, Hafez Ahmadulla sold to one Abdul Kader by a deed of sale which is Ex. C and which was executed on 20th October 1913. On 24th February 1915, the heirs of Ismail and Abdul Samad sold their 5 annas share in all the properties which they got under the deed of settlement of Kulsom, the other daughter of Khidir Buksh and her son Aktar Nabi, defendant 1 in this suit, by a deed of sale which has been marked Ex. E, and Kulsom in her turn made a gift of her entire share to Aktar Nabi who thus acquired a 10 annas share in the properties of Khidir Buksh (*vide* Ex. Y). Defendant 2 first came into the picture in the year 1917. On 1st February 1917, he took mirash patta of a plot of land which is now identified to be the land of C. S. Plot No. 64 from Aktar Nabi and Hafez Ahmadulla on payment of a selami of Rs. 2700 at a fixed annual rent of Re. 1-4-0 only. In this deed of mirash patta which is

a Ex. O, it was recited by the lessors that there was no legal or valid wakf created by Khidir Buksh but it was the duty of the executants of the patta who were the heirs of Khidir Buksh to meet the expenses of the mosque to the best of their abilities and that the expenses would be defrayed by settling the lands in miras and by employing the premium thereof properly. It must be mentioned here that Hafez Ahmadulla had already sold his share in the property to Abdul Kader but this fact was not mentioned in this mirash patta. On the very same day that this mirash patta was executed, Hafez Ahmadulla sold b his 6 annas share in the remaining properties to Aktar Nabi, defendant 1, by the kobala Ex. F. Thus with the exception of the land covered by the mirash patta the rest of the properties were now jointly owned by Aktar Nabi and Abdul Kader. Abdul Kader sold his 6 annas share to defendant 2 in the benami of his son-in-law Nepal Bose by the kobala Ex. G on 18th July 1923. Hafez Ahmadulla was now dead, but as has been said above, he dealt with some portion of the properties as his own even after he transferred the same to Abdul Kader, and we find that Abdul Kader took a release from the heirs of Hafez c Ahmadulla for the purpose of perfecting his title. This release which is marked Ex. Z was executed just a few days before Kader sold his interest to Nepal Bose. Aktar Nabi, defendant 1, mortgaged his share by two different instruments of mortgage in favour of one Jatindra Kumar Das one of which was executed on 28th March 1919 and the other on 31st October of the same year (*vide* Exs. L and H). On 10th October 1925, Aktar Nabi sold to defendant 2 his share in some of the properties covered by the towliatnama and they have been now identified as the western half of C. S. Plot No. 63. The document is Ex. M d and the consideration specified in it is Rs. 5500. Defendant 2, it is said, conveyed a half share of this property as well as of the property which he had previously purchased in the benami of Nepal Bose in favour of the deity Ganesh Deb Thakur who has been made defendant 3 in this suit. On 29th November 1929 defendant 1 transferred his interest in the remaining plots of land covered by the towliatnama of Khidir Buksh with the exception of a small portion of the land appertaining to C. S. Plot No. 57 to defendants 2 and 3 jointly for a consideration of Rs. 11,500. This document is marked Ex. 10. It is in this way that defendants 2 and 3 claim to have acquired title to the properties covered by the kobalas mentioned above.

The present suit was filed on 1st December 1931, against defendants 1 and 2 only. The allegations of the plaintiffs in substance were that the wakf property was properly administered by Khidir Buksh during his lifetime and also by the subsequent mutwallis after his death; it was defendant 1 who having become the sole mutwalli on the strength of certain transactions which he entered into with his cosharers began to treat the wakf property as his personal property and did not look to the interest of the wakf at all. He mortgaged the wakf properties and raised money for his own use in contravention of the terms of the wakfnama and against the directions and practices of the previous mutwallis. In collusion with defendant 2 he transferred the wakf property wrongfully and illegally to defendant 2 with the full knowledge of the fact that the properties were dedicated to the mosque. Defendant 2 was thus in possession of the wakf properties and the rents of the same were realised by him for his own benefit and not for the benefit of the mosque. Paragraphs 19 and 20 of the plaint stand as follows :

"19. That defendant 2 knowingly and fraudulently took possession of the wakf properties and has been utilising the income thereof in collusion with defendant 1 and hence both of them are liable to accounting as trustees de son tort. g

20. That defendant 2 is not a bona fide purchaser for value without notice and as such is a constructive trustee of the wakf properties in his possession and is therefore legally liable to restore the possession of the said properties to the legally appointed mutwallis."

On these allegations the plaintiffs prayed that both the defendants might be removed from the position of trustees or mutwallis de jure or de son tort or constructive; that a new mutwalli may be appointed to take charge of the wakf property and that the wakf properties might vest in such a mutwalli. There was further a claim for accounts against both the defendants and a prayer for framing scheme for the proper management of the wakf estate. h

Both the defendants filed written statements traversing the material allegations contained in the plaint. It was contended inter alia in the written statements of the defendants that no real wakf was created or intended to be created by Khidir Buksh by the towliatnama of 1851 and there was no valid or legal wakf under the provisions of the Mahomedan law. It was said that during the lifetime of Khidir Buksh and after his death the properties were all along treated as the private properties of Khidir Buksh and it

a was never treated as the properties belonging to the Masjid. It was averred further that even if there was any wakf it was a private wakf and did not attract the provisions of S. 92, Civil P. C. So far as defendant 2 was concerned his special plea was that he was a purchaser of the property for lawful consideration and in good faith and had no knowledge of or belief in the existence of the trust alleged by the plaintiffs. It was also contended on his behalf that as he was a stranger to the wakf no relief could be claimed against him under S. 92, Civil P. C.

b After these written statements were filed wherein inter alia the existence of the trust alleged by the plaintiffs was denied the matter was put up before the District Judge on 21st March 1932 when the following order was passed :

"Pleaders heard. The defendants deny that the property is a public trust at all and contend that it is their private property. The suit cannot proceed unless the plaintiffs obtain a declaration that the property is trust property. It is perfectly true that such a suit could be instituted in the Court of the Subordinate Judge. But this Court has jurisdiction over the property and no useful purpose would be served by compelling the plaintiffs to institute two suits. The plaintiffs are directed to amend their plaint and pay court-fees within a month; failing which the suit will be dismissed."

As no court-fees were paid in accordance with this order the suit was dismissed. Against this order of dismissal the plaintiffs took an appeal to this Court. It was heard by Mitter and Rau JJ. In the appeal it was conceded on behalf of the defendants-respondents that even when the defendants in a suit under S. 92, Civil P. C., denied that there was any public trust which would attract the operation of that section, a separate suit for declaration of trust was not necessary, and it was competent for the Court itself to decide as to whether a trust of a public nature existed or not. It was however argued on behalf of defendant 2 that as he was a stranger purchaser and took the property adversely to the trust, if any, the suit lost its character as a suit under S. 92 on impleading him as a party defendant. It was held by the learned Judges that although in a suit under S. 92, Civil P. C., the plaintiff is not entitled to claim relief against a stranger to the trust, yet when according to the averments made in the plaint the stranger occupied the position of a constructive trustee the suit would come within the purview of S. 92, it being a matter of evidence whether the allegations in the plaint were ultimately made out or not. Such a suit was maintainable without the payment of ad valorem court-fees.

This decision is reported in 39 C. W. N. 1103.¹ The result was that the order of dismissal made by the Court below was set aside and the suit was sent back to the trial Court to be tried on its merits.

After the suit went back the plaint was amended and defendant 3 was added as a party defendant. This order of amendment was made on 3rd February 1936. Defendant 3 filed a separate written statement. It was practically on the same lines as the written statement filed by defendant 2. The learned District Judge after a protracted hearing pronounced his judgment on 7th July 1939 decreeing the suit in favour of the plaintiffs. The decree directed the removal of defendant 1 from the office of mutwalli and defendants 2 and 3 from the position of constructive trustees. It further directed that a new mutwalli should be appointed in whom the trust property would vest and a scheme would be prepared for the management of the estate. There was a dispute between the parties as to the identity and existence of the lands covered by the Towliatnama of 1851. The District Judge directed a local investigation to be made on this point and on a consideration of the evidence adduced by the parties came to the conclusion that C. S. Plots 57, 63 and 64 constituted the wakf properties under the Towliatnama of Khidir Buksh. As regards the mosque itself and the other property which was dedicated by Miran and which was found to comprise a portion of C. S. Plot 55, there was no dispute.

The effect of the decree so far as defendants 2 and 3 are concerned is that they have been made liable to restore C. S. Plots 57, 63 and 64 together with all structures erected by them to the new mutwalli that would be appointed by the Court. It is against this decision that defendants 2 and 3 have come up on appeal to this Court.

The arguments put forward by Dr. Basak who appears in support of the appeal can be conveniently grouped under six heads: His first contention is that there was no real wakf made by Khidir Buksh by the towliatnama dated 9th May 1851, and the circumstances of this case conclusively show that his whole intention was to keep the property perpetually in his family under the guise of an illusory dedication: at the best, Dr. Basak argues, the document could be construed to create a charge on secular properties for certain expenses of the mosque. The second argument

1. ('35) 22 A. I. R. 1935 Cal. 505 : 159 I. C. 893 : 63 Cal. 74 : 39 C. W. N. 1103, Abdul Majid v. Sk. Aktar Nabi.

a put forward is that if any wakf was made at all by Khidir Buksh, there was no public trust which would attract the provisions of S. 92, Civil P. C. The third argument raised is that no sanction having been obtained under ss. 92 or 93, Civil P. C., so far as defendant 3 is concerned, the suit against him is not maintainable in law. The fourth argument is—and it seems to be the principal argument in this appeal—that defendants 2 and 3 being stranger purchasers who have all along held the properties purchased by them adversely to the trust were neither proper nor necessary parties to a suit under S. 92, Civil P. C., and no relief could be granted against them. The fifth point raised relates to the identity of the properties covered by the towliatnama of Khidir Buksh and it is contended that the Court below was wrong in holding that C. S. Plots 63 and 64 were included in the document. Lastly, it is argued that the suit is barred by limitation. I shall take up these points one after another.

c Now, the first contention of Dr. Basak resolves itself into two parts. In the first place, the argument is that even though on the face of the document, the towliatnama of 1851 might make a formal declaration of wakf, yet the language of the document and the circumstances of this case will go to establish that the whole transaction was intended to be unreal and fictitious, and there was no real intention on the part of the settlor to create a wakf at all. The other part of the contention is that what was dedicated to religious or charitable purposes was only a very small and insignificant portion of the alleged wakf properties—the bulk being reserved for the benefit of the family. The wakf was thus a mere veil to cover an arrangement for the aggrandisement of the donor's family, and, at best, the properties mentioned in the document might be subject to a charge to the extent of the charitable purposes indicated therein. The first branch of the contention, therefore, relates to the reality of the wakf, while the second refers to its validity in law.

d For both the branches of his argument, Dr. Basak relied strongly upon the language of the towliatnama, Ex. 1. The document is a simple one and its material portion may be set out as follows:

"... Hence I make wakf of the above-mentioned purchased lakheraj land and building for the lighting of lamps of the above-mentioned mosque and execute this towliatnama to the effect following: I appoint at present my wife Rostum alias Dana Bibi and my daughter Srimati Meherjan as mutwallis. They will live and reside in the above-mentioned building and will light the lamps of the

e above-mentioned mosque. They will not be entitled to sell or make gift of the above-mentioned building and land. God willing, if other issues are born to me they also will enjoy the above-mentioned building and lands as mutwallis and my sons and grandsons, etc., and my daughter's sons and grandsons, whoever survives will enjoy the above-mentioned building and lands as mutwallis and will light the lamps of the mosque."

f Thus, there is no doubt that the settlor has made a formal declaration of endowment. He uses the expression 'wakf' which indicates that he relinquishes the properties which are consigned to the custody of God. The object of the wakf is the burning of lamps in the mosque and this is one of the objects recognized as religious and pious under the Mahomedan law. *Vide* 33 ALL. 400.²

g Mr. Gupta concedes that it is open to the appellants to show that the wakf, even though formally declared, was never intended to be acted upon. For that purpose, we are to look primarily to the surrounding facts and circumstances as well as to the conduct of the wakif himself after the wakfnama was executed. The question whether the wakfnama was in fact acted upon or not is not strictly relevant except as a means of and by way of step for determining that intention. *Vide* 59 Cal. 402³ at p. 417. Dr. Basak lays stress upon the fact that the two mutwallis appointed by the deed never exercised their function as such and the wakf property was never delivered to them. As a matter of law no delivery of possession of the wakf properties to the mutwalli is necessary for the purpose of completing the wakf according to the view taken in this province which follows the view of Abu Yusuf. *Vide* Mulla's Mahomedan Law, Art. 151, p. 154, Edn. 11. The point undoubtedly has bearing on the other question as to whether there was any intention to create a wakf or not. We have no materials placed before us in this case which would indicate clearly that the provisions of the wakfnama were never given effect to at all. According to the directions in the towliatnama, the mutwallis were to reside in the house and perform the duties of burning lamps in the mosque. It is true, as Dr. Basak points out, that Khidir Bux never constituted himself mutwalli of the wakf estate, but whatever evidence we have got in this case goes to show that he looked after the mosque and performed its services in the same way as he did before. It appears that although Khidir

2. ('11) 33 All. 400; 9 I. C. 753; 8 A. L. J. 162, Muzhar Husain v. Abdul Hadi Khan.

3. ('32) 19 A. I. R. 1932 Cal. 93; 133 I. C. 657; 59 Cal. 402; 54 C. L. J. 80; 35 C.W.N. 1159, Masuda Khatun Bibi v. Md. Ebrahim.

- a Bux appointed different mutwallis from amongst his descendants at different times, he really intended that all these arrangements would take effect after his death, and so long as he was alive he arrogated to himself the function of a sole *de facto* mutwalli. If Khidir Bux dealt with any portion of the property comprised in the towaliatnama as his personal property obviously that would be a very strong circumstance to show that the document was never meant to be acted upon. In this connexion some reliance has been placed upon Ex. Q which is a hebanama executed by Khidir Bux in favour of his wife
- b Rostum alias Dana Bibi on 17th June 1884. Plot 1 of this document is said to be a portion of the property comprised in the towaliatnama. The learned Judge in the Court below has found that this plot which corresponds to C. S. Dag No. 56 is outside the wakf. As I shall point out later on, this conclusion is correct. The only other transactions which are relied upon as throwing any light on the intention of Khidir Buksh in the matter of creation of the wakf are the two towaliatnamas, Ex. Z (1) and 3, executed on 17th December 1874 and 27th, May 1884, respectively. In both these documents, it is recited that Khidir Bux has made wakf of these properties already and what he purports to do is simply to make provisions relating to the appointment of mutwallis and management of the wakf estate. Dr. Basak is right in saying that Khidir Bux did not reserve to himself the power of altering the arrangement relating to the appointment of mutwallis, as made in the first towaliatnama. These acts, therefore, might be regarded as unauthorized acts which would not in law affect the rights of the mutwallis who were to act under the first deed. But whatever the legal effects of these documents might be—
- d and with that question we are not concerned in the present litigation—they do not certainly show that Khidir Bux had no intention to make the wakf and that he treated the properties as his own personal and secular properties. In the towaliatnama, Ex. Z (1), it is said that the mutwallis will enjoy the property as Malik Dakhalkar, that is to say, owners in possession, and they were given the rights to appropriate the savings from the income of the wakf property. This looks suspicious. But it may be taken as a remuneration to the mutwalli and there is nothing wrong in allowing the mutwallis to appropriate the surplus as their remuneration after executing the trust. It would have been otherwise certainly if the direction was

that the mutwallis would be entitled to take up as much out of the income as was necessary for their maintenance, and the trust would be carried out with the residues of the income. By the third towaliatnama which is Ex. 3, there is some sort of division made with regard to the residential portion of the homestead and the settlor indicates who were to act as mutwallis. It may be argued that as this arrangement was to take effect after the death of Khidir Buksh, he was treating the properties as his. But here again it may be pointed that by the first towaliatnama only the right of residence was given to the mutwallis, and Khidir Buksh was merely indicating here how that right was to be enjoyed.

As regards the portion of the lands which were lying vacant, the mutwallis were enjoined to let it out to tenants or otherwise use it profitably, and out of the income of the same, they were to perform the different duties in connexion with the mosque which were specified in detail in the towaliatnama. There was indeed the provision for the appropriation of the surplus. But as I have said already, it does not show that there was no intention to create a wakf.

The difficulty is that there is no evidence to show what was the conduct of Khidir Buksh himself during his lifetime. It is true as Dr. Basak points out that Khidir Bux even before the execution of the towaliatnama had been carrying on the services of the mosque as a pious Musalman, and there was no change in his conduct or mode of enjoyment of the property after the creation of the wakf, so far as outward appearance is concerned. All this may be conceded, but at the same time, if his conduct was not inconsistent with the wakf character of the properties, we are unable to say that it shows that there was no intention to create a wakf. After the death of Khidir Buksh, his heirs undoubtedly began to deal with the properties as their own personal properties. This cannot be relied upon for the purpose of showing what the real intention of Khidir Buksh was. After all, it seems to me that an apparent transaction must be presumed to be real unless the contrary is established, and the onus of establishing the contrary is on the person who asserts that the transaction is not what it seems. There are undoubtedly, certain matters which might legitimately create suspicion in our minds and give rise to doubts. But as has been said over and over again, the decision of the Court must rest not upon suspicion but upon legal evidence. I am unable to hold that the defen-

dants have been able to prove in this case that there was no intention on the part of Khidir Buksh to create a wakf. The first branch of Dr. Basak's contention under this head must, therefore, fail.

In support of the other branch of his contention, Dr. Basak relies most strongly upon the decisions of the Judicial Committee in 17 I. A. 28;⁴ 19 I. A. 170;⁵ 22 I. A. 76;⁶ and 28 I. A. 15.⁷ Dr. Basak's argument, in substance, is that practically the whole of the property mentioned in the towaliatnama was left for the benefit of the founder's heirs with a nominal endowment for religious purposes. He says, therefore, that the wakf is illusory and not a valid wakf under the Mahomedan law. In all these cases which were decided under the law as it stood before the passing of the Wakf Act in 1913 it was held by their Lordships of the Judicial Committee that when the effect of a deed of wakf was in substance to give the property to the donor's family and only an insignificant portion was set apart for charity or religious purposes, such a wakf was invalid under the Mahomedan law. In 17 I. A. 28,⁴ the wakf deed contained elaborate provisions for the appointment of the settlor's sons and descendants as mutwallis and their salaries and for the maintenance of the family of the donor from generation to generation, and the only provision in the deed relating to charity was that the mutwallis should defray the customary expenses of a masjid, two madrassahs, and of travellers. It was found that these required a very small expenditure compared with the income and it was held that the main purpose was the aggrandisement of the settlor's family and the gift to charity was illusory. In 19 I. A. 170,⁵ the legal heirs of the settlor were the only recipients of the bounty. In 22 I. A. 76,⁶ two brothers executed a deed making a wakf of their properties for the benefit of the children of the donors and their descendants from generation to generation, and on total failure of their descendants for the benefit of widows, orphans, beggars, etc. It was held that the gift to the poor was too remote and was hence bad. In 28 I. A. 15,⁷ the income to be devoted to charity was left entirely to the discretion of the

mutwallis and consequently, it was held to be invalid.

I do not think that any of these decisions has got direct application to the facts of the present case. Here, the settlor makes wakf of his properties consisting of the dwelling house and the adjacent lands for the purpose of rendering certain services to the mosque. The dwelling house was intended to be used as a place of residence by the mutwallis and they could only derive some small income from the vacant lands. Out of this income, they were to defray the expenses of the mosque and the rest they were entitled to appropriate as mutwallis. There is nothing in the record to show that the vacant lands could fetch a large income, and that only an insignificant part would be required for services of the mosque and the bulk of it could be absorbed by the descendants of the founder. Moreover, nothing was left to the descendants as such, and whatever they got they got as mutwallis. In these circumstances, I find it difficult to hold that the trust was illusory and the property was really given to the heirs with a charge for religious expenses mentioned in the deed. There is no question of the wakf being considered wakf-al-aulad and the question need not be considered at all. It is true that in the subsequent transactions, which were entered into by the heirs of Khidir Buksh, the property was treated as secular property, and the heirs acknowledged only in a vague way their duty to render service to the mosque. But the subsequent conduct of the heirs, as I have said already cannot invalidate the endowment. I hold, therefore, that there was a valid wakf created by Khidir Buksh and the decision of the Court below on this point must stand.

The next point for our consideration is whether the trust created by Khidir Bux constituted a public trust within the meaning of s. 92, Civil P. C. Dr. Basak argues that the trust would not constitute a public trust, firstly, because the mosque for the benefit of which the property was dedicated was not a public mosque; and secondly, because the major portion of the benefit arising out of the wakf was reserved for the mutwallis and not for the mosque and hence the trust according to him must be deemed to have been created for a private purpose. The learned District Judge has found on evidence that the mosque is a public mosque and not a family mosque of Khidir Bux. The mosque was undoubtedly built on a plot of land contiguous to the homestead of Khidir Bux, but the map and the evidence go to show that it was not in

4. ('90) 17 Cal. 498 : 17 I. A. 28 : 5 Sar. 476 (P.C.), Sheikh Mahomed Ahsanullah v. Amarchand Kundu.

5. ('93) 17 Bom. 1 : 19 I. A. 170 : 6 Sar. 238 (P.C.), Abdul Gaffur v. Nizamuddin.

6. ('95) 22 Cal. 619 : 22 I. A. 76 : 6 Sar. 572 (P.C.), Abul Fata Mahomed Ishak v. Russomoy Dhur Choudhury.

7. ('01) 23 All. 233 : 28 I. A. 15 : 7 Sar. 829 (P.C.), Mujibunnissa v. Abdul Rahim.

^a any way attached to the dwelling house. There is a vacant piece between the house of and the masjid and the fact that the entrance door which was said to be situated on the north-west has since been shifted further to the east does not really affect the position. A large number of witnesses have been examined on behalf of the plaintiffs to prove that the mosque has all along been used freely by the members of the Muslim public for all prayers including congregational prayers, and neither defendant 1 nor any member of the family of Khidir Bux has come forward to say that the mosque was used for the members of the family of Khidir Bux alone. The learned advocate for the appellants has not challenged the oral evidence on this point which was relied upon by the Court below. He has merely laid stress on two documents, viz., Exs. B and S, in both of which the mosque was treated as the private property left by Khidir Bux. Exhibit B is the deed of family settlement executed by and between the heirs of Khidir Bux to which reference has been made already and Ex. S is a deed of gift executed by one Jahura Bibi, a sister and heiress of Rostam Bibi alias Dana Bibi, widow of Khidir Bux in favour of Hafez Ahmedulla. As ^c has been said already, the heirs of Khidir Bux all along ignored the wakf character of the property altogether and treated the properties as their own secular properties. There is nothing unnatural therefore for them to speak of their shares in the mosque as well. One strong circumstance in favour of the plaintiffs is that Miran who was a perfect stranger did make a gift of some lands to the mosque. This would be unthought of, if the mosque was a family mosque as alleged by the defendants. In the absence of any rebutting evidence coming from the defendants' side regarding the nature of the mosque, I am unable to say ^d that the decision of the Court below on this point is wrong.

The other point raised by Dr. Basak in this connexion does not appear to me to be convincing. In the first place, the mutwallis were appointed for the purpose of carrying on the duties in connexion with the mosque and the benefits given to them must be considered as appurtenant to the main purpose for which the dedication was made and cannot be regarded as a separate and independent gift. Moreover, there are no materials before us for determining the respective money values of the benefits reserved for the mosque and that for the mutwallis themselves, and it is difficult to say that one is greater than the other. No evidence is adduced to show what was the

income of the wakf properties, and how much of the income would be absorbed for the purpose of lighting the mosque and performing other services in connexion therewith. The mutwallis again were only given the right of residence and it is extremely difficult to assess a right of residence at its money value. This contention therefore must fail.

The third point raised in this appeal is that the suit must fail against defendant 3 for want of sanction under S. 92, Civil P. C. It is not disputed that the sanction that was obtained from the Collector of Dacca under S. 93, Civil P. C., and on the basis of which the suit was instituted did not include defendant 3 as a party to the suit. The sanction was given to file a suit only against Akhtar Nabi and Gobinda Chandra Ghosh: (*vide* page 30 of the paper book). Defendant 3, as I have said already, was added a party on 3rd February 1936, after the suit went back from this Court. The plaint was altered and all the allegations made against defendant 2 were also made against defendant 3 and it was prayed that both defendants 2 and 3 might be removed from their positions as trustees de jure or de son tort or constructive. It admits of no doubt that the obtaining of sanctioning of the relevant authorities is a condition precedent to a validly instituted suit under S. 92, Civil P. C. When in a suit of this description, a new defendant was added and certain additional reliefs were prayed for against him, it was held by Daver J., in 36 Bom. 168,⁸ that a fresh sanction of the Advocate-General was necessary. Mr. Gupta argues that once a suit is validly commenced after obtaining sanction as is necessary under S. 92, Civil P. C., no fresh sanction is necessary at a further stage of the suit. This cannot possibly be disputed nor can it be disputed that the amendment of the plaint or the addition of the party, which does not alter the nature of the claim in the suit does not necessitate a fresh sanction, but when such amendment or addition of party does change the nature or scope of the suit, a fresh sanction is certainly required. Here, as against defendant 3, there is a totally different cause of action; the relief claimed against him is also different. The plaintiffs seek to make defendant 3 liable as a constructive trustee and claim reliefs against him on that footing. That, in my opinion, certainly extends and alters the scope of the suit, and as no sanction was obtained previous to defendant 3 being added as a party to

8. (12) 36 Bom. 168 : 11 I. C. 726 : 13 Bom. L. R. 583, Abdul Rahman v. Cassum Ebrahim.

a the suit, so far as defendant 3 is concerned, the suit cannot be held to be maintainable.

I now come to the next point urged by Dr. Basak, namely whether defendants 2 and 3 could at all be impleaded as parties defendants to the suit under s. 92, Civil P. C., and whether any relief could be granted against them. A suit under section 92, Civil P. C., is for execution and administration of a public trust either express or constructive, provided that the trust is of a religious or charitable nature, and the object of the section is to protect the rights of the public in such trust and to stop misuse of the income of charitable institution. In order that the section may apply it is necessary: (1) that there must exist a trust either express or constructive for public purposes of charitable or religious nature; (2) the plaintiff must allege that there is a breach of trust or that direction of the Court is necessary for the administration of the trust; (3) the suit must be one on behalf of the public and not by individuals for the protection of their own interest and lastly, (4) the relief claimed must be one of the reliefs mentioned in the section. If the existence of a public trust of the nature mentioned above is admitted or proved, and it is found that the trustee in breach of the trust has improperly alienated the trust property to a stranger, the question arises whether the alienee is a necessary or proper party to the suit under s. 92, Civil P. C., and whether the Court can grant any relief against him under that section.

The view that has been taken by all the High Courts in India is that if the essence of the plaintiffs' claim against such alienee is that he is a trespasser and the property of which he is in possession should be restored to the new trustee, that is to be appointed by the Court, such relief is outside the scope of a suit under s. 92, Civil P. C. This Court has held in a long series of cases that it is not competent to the Court to implead the alienee at all in such a suit. Reference may be made to the cases in 2 C. L. J. 431;⁹ 33 Cal. 789;¹⁰ 28 C. L. J. 4;¹¹ 41 C. W. N. 298¹² and 42 C. W. N. 345.¹³ The Allahabad High Court is of opinion that the alienee is not a necessary party to a

suit under s. 92, Civil P. C.: *vide* 20 ALL. 46,¹⁴ though he may be a proper party: *vide* 28 ALL. 112.¹⁵ In Madras the view taken is that the transferee cannot be made a party, but if he himself desires it he could be made a party. *Vide* the observations of the Officiating Chief Justice in 27 M. L. J. 266.¹⁶ Seshagiri Aiyar J., on the other hand, was of opinion, that he was a proper party though no relief could be claimed against him. This was also the view taken in 28 M. L. J. 326.¹⁷ In A. I. R. 1936 Mad. 449,¹⁸ Varadachariar J., made a distinction between an absolute stranger to a trust property and one who derives his title from the settlor or cestui que trust. In the latter case, he was of opinion that the person could be joined as a proper party though no relief could be claimed against him. The Bombay High Court has held that the alienee is a necessary party in such a suit though possession could not be recovered from him in the suit itself: *vide* 35 Bom. 470.¹⁹ The Rangoon High Court has taken the same view as the Calcutta High Court: *vide* 10 Rang. 342.²⁰ In 55 I. A. 96,²¹ Lord Sinha thus sums up the law on the point:

"Their Lordships see no reason to consider that S. 92 was intended to enlarge the scope of S. 539 by the addition of any relief or remedy against third parties, i. e., strangers to the trust. They were aware that the Courts in India have differed considerably on the question whether third parties could or should be made parties to a suit under S. 539, but the general current of decisions was to the effect that even if such third parties could properly be made parties under S. 539, no relief could be granted as against them. In that state of the previous law, their Lordships cannot agree that the Legislature intended to include relief against third parties in cl. (h) under the general words 'further or other relief'."

Now the main ground of all these decisions referred to above is that a relief against a third party is not one of the reliefs specified in s. 92, Civil P. C., and cannot be brought within the words 'such further or other relief' which should be construed ejusdem generis with the previous clauses. Another reason

14. ('97) 20 All. 46 : 1897 A. W. N. 210, Huseni Begam v. Collector of Moradabad.

15. ('05) 28 All. 112 : 2 A. L. J. 591 : 1905 A. W. N. 208, Ghazaffar Hussain v. Yawar Husein.

16. ('15) 2 A. I. R. 1915 Mad. 517 : 25 I. C. 794 : 27 M. L. J. 266, Asam Raghavalu v. Sitamma.

17. ('16) 3 A. I. R. 1916 Mad. 979 : 28 I. C. 898 : 28 M. L. J. 326, Rangayya Naidu v. Chinnasamy.

18. ('36) 23 A. I. R. 1936 Mad. 449 : 164 I. C. 615 : (1937) 2 M. L. J. 437, Anjaney Sastri v. Kothandapani Chettiar.

19. ('11) 35 Bom. 470 : 12 I. C. 30 : 13 Bom. L. R. 690, Collector of Poona v. Bai Chanchal Bai.

20. ('32) 19 A. I. R. 1932 Rang. 132 : 140 I. C. 317 : 10 Rang. 342, D. Po Min Johnson v. U Ogh.

21. ('28) 15 A. I. R. 1928 P. C. 16 : 108 I. C. 361 : 55 Cal. 519 : 55 I. A. 96 (P. C.), Abdur Rahim v. Mahomed Barkat Ali.

9. ('05) 2 C. L. J. 431, Budh Singh Dudhoria v. Nirad Baran Roy.

10. ('06) 33 Cal. 789 : 10 C. W. N. 561, Budree Das Mukim v. Chooni Lal Johury.

11. ('18) 5 A. I. R. 1918 Cal. 5 : 47 I. C. 111 : 28 C. L. J. 4 (S. B.), Gholam Mowlah v. Ali Hafiz.

12. ('37) 41 C. W. N. 298, Faizunnessa v. Asad Bukht.

13. ('38) 25 A. I. R. 1938 Cal. 278 : 176 I. C. 842 : 42 C. W. N. 345, Massirat Hossain v. Hossain Ahmed Choudhury.

a given is that a suit under S. 92, Civil P. C., is started by persons who are not prima facie entitled to possession themselves. Till the trustee is removed, the trust property vests in him, and he alone is competent to sue for possession. If such trustee is removed and the estate vests in the new trustee, the latter can undoubtedly sue to recover possession. In the present case, it may be noticed that there is no distinct prayer for recovery of possession. All that is wanted is that defendants 2 and 3, either as de jure or de facto trustees or trustees de son tort should be removed and this means both according to the plaint and the judgment b that they should restore possession of the properties in their possession to the trustee appointed by the Court. The District Judge in the present case has proceeded entirely on the ground which was indicated by Mitter and Rau JJ., in 39 C. W. N. 1103,¹ which as I have already said, is a pronouncement at an earlier stage of this very suit. Mitter J., who delivered judgment points out that though no relief by way of declaration of trust or recovery of possession of the trust property, can be claimed against a stranger to the trust in a suit under S. 92, Civil P. C., yet if on the allegations made in the plaint, such a c stranger is a constructive trustee, the suit could be treated as one under S. 92, Civil P. C. The learned Judge quoted certain passages from the well-known treatises of Underhill and Lewin on the subject of trust, and said that when a stranger to a trust receives money or property from the trustee which he knew to be part of the trust estate and paid or handed over to him in breach of trust, he is a constructive trustee for the persons equitably entitled. In the plaint in the present case, there were allegations to the effect that defendants 2 and 3 were trustees de son tort and they procured defendant 1 to do various d illegal and unconscionable things with a view to injure the wakf property with full knowledge of the fact that the properties were permanently dedicated to the wakf. It was said by Mitter J., that if these allegations were proved, defendant 2 might be held to be a proper party to a suit under S. 92, Civil P. C.

It may be pointed out here that in none of the cases to which I have referred already the question was approached from this standpoint. In many of the cases cited above, the properties were either wakf or debutter properties, and if the point had been investigated it could possibly have been found that the alienee had notice of the trust. The question was raised in 28 C. L. J. 4,¹¹ and was slightly

touched in the judgment of Sanderson C. J. The point however was not fully discussed, as the Chief Justice thought that though the stranger had constructive notice of the trust, he had no actual knowledge of it. In 42 C. W. N. 345,¹³ defendant 2 in the suit was an ijaradar under defendant 1 who was mutwalli of a wakf estate, and it was distinctly alleged in the plaint that defendant 1 had come under the hands of defendant 2 who induced him to enter into an arrangement by which the wakf property was leased out to defendant 2 at a rental of Rs. 1200 a year, and this money was appropriated by defendant 1 for his own personal use. In spite of this allegation, it was held by the learned Judges that defendant 2 was not a necessary party to a suit under S. 92, Civil P. C. The question therefore is an important one and requires careful investigation.

Now, in English law, the legal estate is in the trustee and the beneficiary has a mere equitable estate. If the trustee in breach of trust transfers the property to another person and the alienee has notice of the trust, he is regarded in English law as a constructive trustee for the cestui que trust. He undoubtedly acquires the legal estate in the property by virtue of the transfer, but to the legal g estate was annexed an equitable obligation in favour of the cestui que trust and the obligation could be enforced against the transferee if he was either a volunteer or even if the transfer was for value he had notice of the same. Apart from the cases where a person occupying a fiduciary position makes profit by taking advantage of his position as such, a constructive trust arises generally, under English law, whenever, a person has the legal estate but has not the complete equitable estate in him. To the extent that he lacks equitable estate, he is a constructive trustee for the person or persons who have the equitable estate : *vide* Underhill's Law of Trust, Art. 32, p. 188, Edn. 9. This doctrine of constructive trust enables the beneficiary to follow the trust property in the hands of a stranger who though he has acquired the legal estate from the trustee is affected with a notice of the trust. This conception, in my opinion, is absolutely inapplicable when the property transferred is wakf property. Both in Hindu debatter as well as in wakf under the Mahomedan law, the full legal and beneficial ownership of the property is in the deity or in the wakf. The mutwalli or the shebait is a mere manager who has not the legal estate in him as in the case of an English trustee. The transferee from the mutwalli, therefore, does

a not get the legal estate and the question whether he purchases with notice of the wakf or not is really immaterial. The mutwalli has no right to transfer the property except in certain exceptional circumstances recognised by the Mahomedan law, and the fact that the purchaser is a bona fide purchaser for value without notice would afford no protection to him. If the wakf character of the property is established, the transferee becomes a trespasser pure and simple who has purchased from one person property belonging to another and the proper remedy against him would be an action in ejectment. Mr. Gupta concedes that there
 b is no necessity of importing this principle of English law into the law of Hindu or Mahomedan endowments, but he says that as a shebait or mutwalli is regarded as a trustee for purposes of S. 92, Civil P. C., there is nothing per se improper in extending this doctrine of constructive trust in the case of a shebait or mutwalli as well. To this the answer is that S. 92, Civil P. C., has been held to be applicable to shebaits or mutwallis, not because they are trustees in the English sense of the word, but because in view of the obligations and duties resting upon them, they are liable
 c as trustees in the general sense for maladministration of the trust fund or trust property : *vide* 48 I. A. 302.²²

If the position of a transferee of a wakf property, either with or without notice of the wakf is that of a trespasser, I do not see any reason why he should be regarded as a trustee for the purposes of a suit under S. 92, Civil P. C. The essence of the claim against him must be that he should restore possession of the property which is held by him. There is no question of execution or administration of trust so far as he is concerned. If the purchaser had taken upon himself the duties of a trustee and became a trustee de son tort, relief against him under S. 92, Civil P. C.,
 d might certainly be claimed. But when he has purchased the property not as wakf property, but as the personal property of the mutwalli and purports to hold it adversely to the trust, he is in the position of a rank trespasser and not that of a trustee either actual or constructive. It would be disastrous, I think, to the interests of the wakf estate itself if for the recovery of trust property in such circumstances a suit under S. 92, Civil P. C., is deemed to be necessary.

Assuming however that the English law is applicable to the present case, let us analyse

22. ('22) 9 A. I. R. 1922 P. C. 123 : 65 I. C. 161 : 48 I. A. 302 : 44 Mad. 831 (P. C.), *Vidya Varuthi Thirtha v. Balusami Ayyar*.

the position more in detail. A transferee of the trust property with notice of the trust is a bare trustee in English law. Mere notice of the trust does not impose upon him the duties of a trustee and he cannot be called upon to perform any of the functions of a trustee either de jure or de facto (*vide* Underhill's Law of Trust, Art. 202) and the only right which the cestui que trust can assert against him is the right to follow the property in his hands. Mr. Gupta has argued before us that a transferee with mere notice may not have any duties as a trustee, but the obligations of a trustee could be imposed upon him if certain other conditions are fulfilled, and he relies in
 f this connexion upon the decisions in (1874) 9 Ch. A. 244,²³ (1892) 2 Ch. D. 265²⁴ and (1893) 2 Q. B. D. 390.²⁵ In the first of these cases a question arose regarding the liability of the solicitor who prepared certain deeds at the instance of his clients who were trustees, relating to certain matter which amounted to breach of trust but advised his clients against their execution. Lord Selborne L. C. who delivered the judgment observed as follows :

"Now in this case we have to deal with certain persons who are trustees, and with certain other persons who are not trustees. That is a distinction to be borne in mind throughout the case. Those who create a trust clothe the trustee with a legal power and
 g control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees de son tort or actually participating in any fraudulent conduct of the trustee to the injury of the cestui que trust."

This dictum was quoted in extenso in (1892) 2 Ch. D. 265,²⁴ where it was held that a cestui que trust might proceed against an agent of the trustee when he has not confined himself to the duties of an agent, but by accepting a delegation of the trust, or by fraudulently mixing himself up with a breach of trust has himself become a trustee by construction of
 h law, i.e., a trustee de son tort. In (1893) 2 Q. B. D. 390²⁵ a solicitor had retained some money which he got from his clients who were trustees. It was held by Lord Esher, M. R. and Bowen L. J. that he was liable as a trustee because he received the money in a fiduciary capacity. Kay L. J. held that he was trustee, because, though a stranger to the trust, he had assumed to act and had acted as a

23. (1874) 9 Ch. A. 244; 43 L. J. Ch. 513; 30 L. T. 4 : 22 W. R. 505, *Barnes v. Addy*.

24. (1892) 2 Ch. D. 265 : 61 L. J. Ch. 585 : 67 L. T. 23 : 40 W. R. 637, *In re Barney ; Barney v. Barney*.

25. (1893) 2 Q. B. D. 390 : 4 R. 602; 69 L. T. 585 : 42 W. R. 165, *Soar v. Ashwell*.

a trustee and had received the trust money under a breach of trust in which he concurred.

As was pointed out by Mitter J. in 39 C. W. N. 1103,¹ referred to above, there were allegations in the plaint in the present case which would bring defendant 2 to this suit within the purview of the principles enunciated by Lord Selborne in (1874) 9 Ch.A. 244.²³ It was alleged in the first place, that defendant 2 had acted as trustee *de son tort*. It was also alleged that he had procured defendant 1 to commit various acts of bad faith and misappropriation in breach of the trust and to the injury of the wakf estate. If either of b these two sets of allegations were proved, defendant 2 could be held to be constructive trustee within the principles enunciated in the English cases and this was all that was held by Mitter J. After the plaint was amended and defendant 3 was added as a party to the suit, the case against him also stood on the same ground.

It is not disputed that in the present case there is no question of either of these two defendants acting as trustees *de son tort*. They had never taken upon themselves the obligation of performing any of the duties connected with the wakf. The question now is whether c they could be made liable as constructive trustees by reason of their actively participating in the fraud and breach of trust that are alleged to have been committed by defendant 1. Now, the deeds by which defendants 2 and 3 acquired the properties are Exs. O, G, M, and 10. Exhibit O is the Miras patta executed by Aktar Nabi and Hafez Ahammed-ulla in favour of defendant 2. Exhibit G is the kobala by which Abdul Kader sold six annas share of the properties to Nepal Chandra Bose, the benamdar of defendant 2 while Exs. M and 10 are the other two sale deeds by which these defendants acquired title to the remaining d share. The recitals in almost all these documents mention the towliatnama of 1884 and we might hold that defendants 2 and 3 had actual notice of the last towliatnama and constructively of the earlier ones. It was recited by the executants in these documents that on the face of the towliatnama there was no legal and valid wakf made by the wakif and that the properties were all along treated by the heirs of Khidir Buksh as their personal properties. They recognised in a vague way their obligation to defray certain expenses of the mosque but this was more or less treated to be a personal liability on the part of the heirs of Khidir Buksh rather than a charge upon the property itself. In the Mirash patta Ex. O, there was some recital of legal necessity and

the indemnity bonds taken by the defendants also show that they had some suspicion in the matter.

In my opinion, the mere fact that defendants 2 and 3 had notice of the towliatnama or of the fact that the properties which they were purchasing were comprised in the towliatnama would not bring them within the purview of the principle enunciated by Lord Selborne in the case mentioned above. The mere fact that they had notice of a document which was described as a towliatnama is not enough, they must be aware of the legal effect and implications of the document and they must know that what they were concurring in f what amounted to a breach of trust on the part of the trustee. In the case before us it appears from the evidence that Aktar Nabi and the other vendor did represent to the other defendants that there was no valid or legal wakf existing with regard to these properties and they were all along being bought and sold and transferred as secular properties. So far as outward appearances go there was nothing to indicate that the properties were ever treated as wakf properties and during the long course of years extending over half a century, no member of the Mahomedan public ever asserted that these properties belonged g to the mosque. The towliatnamas as the District Judge himself points out, are not at all clear and unambiguous documents and it was certainly an arguable point whether any valid or legal trust was created thereby. Moreover, the various circumstances and the long course of conduct which I have referred to already do not unnaturally raise a suspicion that there was no real intention on the part of the settlor to make a wakf. As the properties are now held to be wakf properties, these circumstances would not afford any protection to the transferees, but they show certainly that the latter might not have been aware of and ac- h tively participated in any act of fraud committed by defendant 1 and hence could not be regarded as constructive trustees, although they might not have acquired any title to the properties purchased by them. No case of constructive trust arises in English law, when the transferee has notice of a doubtful equity and the document upon which it is founded is not unambiguous : *vide* Underhill's Law of Trusts, p. 556, Edn. 9.

In my opinion, therefore, the principles of English law are not at all applicable to such cases, but even if they are deemed to be applicable, defendants 2 and 3 cannot be held to be constructive trustees on these principles, which could make them proper parties to a

a suit for execution and administration of a trust which s. 92, Civil P. C., contemplate.

Mr. Gupta has laid considerable stress on the judgment of Mitter and Rau, JJ. We may even take it that the decision is binding on defendant 2 as *res judicata*. As I have said already, I do not agree with the view taken by the learned Judges, but taking the judgment to be correct, it does not affect the present position in the least. The allegations made in the plaint wanted to fix on defendants 2 and 3 the liability as trustees *de son tort* or constructive trustees. The decision of Mitter and Rau JJ. was to the effect that b defendant 2 may be a proper party to a suit under s. 92, Civil P. C., if the allegations made in the plaint were proved. In my opinion these allegations have not been made out and the decision of Mitter and Rau JJ. therefore does not stand in the way. It is conceded by Mr. Gupta that the decision would not be binding on defendant 3.

Mr. Gupta has argued in the last resort that, at any rate, defendants 2 and 3 might be retained as parties to the suit and the decision might be given in their presence. This is undoubtedly the view taken by some of the other High Courts in India. It seems c to us to be opposed to all principles to make a decision in the presence of a particular party with a view to make him bound by it when admittedly no relief can be given against him. The matter would have been different if he were a mere formal or *pro forma* party. It is an arguable point whether such party would have the right of appeal against such decision, although no decree was passed against him. So far as this Court is concerned, one consistent view has been followed throughout, and we do not think that it would be proper on our part to make a departure in this direction.

d The next point raised by the appellant relates to the identity of the properties that are covered by the *towliatnama*, Ex. 1. On this point, we think that the decision of the Court below is right. The argument of the appellants is that plots Nos. 63 and 64 are outside *towliatnama*; Ex. 1, it is said, includes c.s. plot No. 56 on the south. If one takes measurements from c.s. plot No. 56 and proceeds upwards, then according to the dimensions given in Ex. (3) plots Nos. 63 and 64 would stand outside the *towliatnama*. We do not think that this view is right, although it was accepted by the Commissioner who made the local investigation. The question really is as to what was the southern boundary of the land covered by Ex. 1. The southern boundary is there

stated to be the lands of Nidus Saheb. This document was executed in 1851. In 1861, by Ex. 4, Khidir Bux acquired the lands of Nidus Saheb. The northern boundary of that land was stated to be the pucca dewri of Khidir Bux Khansama. If the pucca dewri be on c.s. plot No. 57, then this plot cannot but be c.s. plot No. 56, and obviously it would be outside the wakf. Mr. Guha contends primarily on the basis of the map of 1859 that the pucca dewri was on c. s. plot No. 56 and consequently the land sold by Ex. 4 was further to the south and tallied with c.s. plot No. 12. Mr. Guha has however conceded that plot 1 of Ex. Q is c.s. plot No. 56. Exhibit Q is of the year 1884, and it does not mention any chow-dewari existing on it. On the other hand, it mentions a one storied pucca building. If plot 1 of Ex. Q is the same as the plot covered by Ex. 4 and we have no doubt that it is so, it must be held that the dewri really stood on c.s. plot No. 57 and not upon plot No. 56. It is true that Mr. Guha's argument is supported by the relaying of the pleader commissioner who based his local investigation upon the survey map of 1859. I, however, agree with the District Judge that the survey map cannot be taken to have shown the dimensions of the structures accurately and to the scale. In g these circumstances, we think that the decision of the Court below on this point must stand.

The last point is one of limitation. As I have said already, no reliefs could be granted against defendants 2 and 3, and it is not necessary to decide the question of limitation so far as they are concerned. If and when the new trustee institutes a suit against defendants 2 and 3, this question would have to be decided. As regards defendant 1 it is conceded that no question of limitation arises.

The result, therefore, is that we allow this appeal in part, the decree of the Court below h against defendant 1 will stand. Defendant 1 will be removed from his position as *mutwalli* and a new *mutwalli* will be appointed. We think that the plaintiffs can also claim accounts against defendant 1 and the cross objections filed by them is allowed to this extent. The reliefs given against defendants 2 and 3 will be vacated and the suit will stand dismissed against them.

We make no order as to costs in this appeal. Plaintiffs will get costs against defendant 1 in the trial Court. Defendants 2 and 3 will bear their own costs throughout.

Pal J.—This appeal is by defendants 2 and 3 in a suit under s. 92, Civil P. C. The trust in question is an alleged wakf for the

a upkeep and maintenance of a mosque at Raisahebbazar in the town of Dacca. The mosque is alleged to have been erected by one Khidir Buksh Khansama of the locality and the wakf is alleged to have been created by him by a wakfnama dated 27th Baisakh 1258 B.S. corresponding to 9th May 1851. This alleged wakfnamah is Ex. 1 in this case. The properties claimed as appertaining to this wakf are given in the three schedules of the plaint. The property given in Sch. A is the same as given in Sch. B as Items 2 and 3. Item 1 of Sch. B is the mosque. Defendants 2 and 3 are concerned only with the properties given in Sch. A and in Sch. B, Items 2 and 3. In the original plaint the properties were described in the schedules only by the boundaries as found in the documents of 1851 to 1884 (Ex. 3) subsequently on 24th September 1936, in course of a local investigation the plaintiffs gave the present boundaries and the corresponding C. S. Dags.

The plaintiffs are six persons of the locality and they instituted the present suit on 1st December 1931 after having obtained on 30th November 1931 the consent in writing of the Collector of Dacca under S. 93, Civil P. C. The suit as originally constituted and instituted on 1st December 1931 was only against defendants 1 and 2. The consent of the Collector was obtained for the suit as it was then constituted. The consent was given on the plaint itself and it was in the following terms:

"(1) Abdul Majid Ostagar, (2) Sheik Ismail Ostagar, (3) Sheik Ismail Ostagar, (4) Mia Chand, (5) Golam Ali and (6) Abdul Aziz, all of Raisahebbazar, P. S. Sutrapur, are hereby permitted to file a suit in the Court of the District Judge, Dacca, against (1) Sheikh Akhtar Nabi son of late Abdul Jabbar of Raisahebbazar and (2) Gobinda Chandra Ghose alias G. Ghose, son of late Shib Chandra Ghose of Rai Saheb Bazar P. S. Sutrapur and I hereby give consent to the institution of the suit under S. 93, Civil Procedure Code."

a Defendant 1 was alleged to be sole mutwalli of the wakf and defendant 2, who was purchaser of some of properties of the alleged wakf, was alleged to have become a constructive trustee, having received trust property from the trustee knowing the same to be part of the trust estate and to be handed to him in breach of the trust. Defendant 3 is the deity Gonesh Deb Thakur and is represented by its shebait defendant 2. The deity was added as the party defendant 3 only on 3rd February 1936 on the application of the plaintiffs. It was alleged that this defendant also became a constructive trustee like defendant 2 having purchased the trust property from the mutwalli, knowing the same to be part of the trust estate and to be handed to

it in breach of the trust. It may be noticed in this connexion that no fresh consent either of the Collector or of the Advocate-General was obtained permitting this addition of party.

The following genealogical table will show the position of the alleged mutwalli in relation to the alleged wakif and will also show the relationship of some of the plaintiffs with the said wakif.

(See pedigree on page 179.)

The plaintiffs' case is :

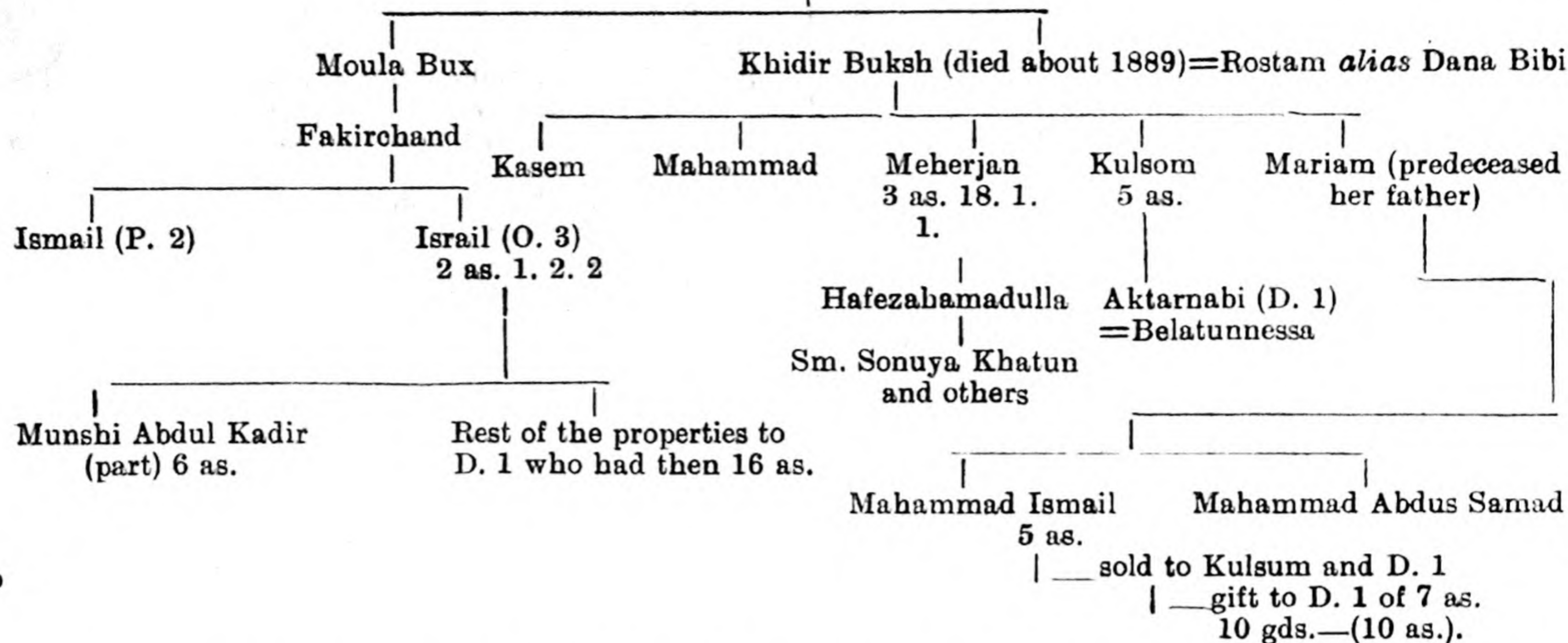
(1) That the above-named Khidir Buksh Khansama erected a mosque at Raisaheb Bazar and permanently dedicated to this mosque the properties described in Sch. A of the plaint for its upkeep and maintenance, and in pursuance thereof he executed a wakfnama on 27th Baisakh 1258, B. S. corresponding to 9th May 1851 (Ex. 1).

(2) That the property in Sch. C was dedicated to this mosque by one Miran, a stranger to the family of Khidir Buksh in 1866 by a towliatnama executed by him on 12th Asar 1273 B. S. corresponding to 25th June 1866 (Ex. 2).

(3) That Khidir Buksh Khansama appointed his wife Mt. Rostam alias Dana Bibi and his daughter Meherjan to be the first mutwalli of the wakf and that Miran appointed Khidir Buksh to be the mutwalli of the wakf created by him.

(4) (a) That during his lifetime Khidir Buksh, the wakif, in exercise of his power of discharging, dismissing and reappointing mutwallis, appointed his two sons, Mia Muhammad Kasem and Muhammad to be the mutwallis and then on Muhammad's death appointed by a fresh towliatnama dated 15th Jeth 1291 B. S. corresponding to 27th May 1884, his son Md. Kasem, his wife Rostam alias Dana Bibi, his daughters Meherjan and Kulsom and his grandson Md. Ismail to be the mutwallis. (b) That these mutwallis assumed the mutwalliship and all along acted as such.

(5) That after the death of the above mutwallis their heirs assumed a different attitude and began to treat the wakf property as their own private property and eventually defendant 1 in collusion with the heirs of other mutwallis created some paper transactions and thereby assumed the position of the 16 annas owner of the wakf properties : (para. 7 of the plaint.) (The case of the plaintiffs seems to be that the legal effect of this was to constitute defendant 1 the sole mutwalli of the wakf since then.)



(6) That defendant 1 having thus been the sole mutwalli began to treat the wakf property as his own although at the same time he managed and administered the wakf properties as mutwalli de son tort.

c (7) (a) That defendant 1 in collusion with defendant 2 transferred the wakf properties to defendant 2 most wrongfully and illegally (para. 13). (b) That defendant 1 contracted heavy debts and defendant 2 taking advantage of this involved position of defendant 1 got him under his unfair and undue influence and by the use thereof procured the said defendant 1 to do various wrongful and unconscionable things with reference to the wakf properties with full knowledge of the factum of the wakf (para. 14). (c) That defendant 1 sold the properties to defendant 2 in 1332 B.S. (para. 15). (d) That defendant 2 has now been in possession of the wakf properties and the rents, profits and income of the wakf properties are now being utilized by him for his own use and benefit (para. 17). (e) That defendant 2 knowingly and fraudulently took possession of the wakf properties and has been *d* utilising the income thereof in collusion with defendant 1 and hence both of them are liable to accounting as trustees de son tort (para. 19).

(8) That by the above transaction defendant 2 became a constructive trustee and rendered himself liable to account for the rents, profits etc., misappropriated by him. (9) That defendant 1 was guilty of various breaches of trust (para. 22).

The plaintiffs claimed the following reliefs, namely: (1) removing defendants 1 and 2 from the position of trustees or mutwalliship de jure, de son tort or constructive; (2) appointing a new mutwalli; (3) vesting the entire wakf properties given in Schs. A, B and C of

the plaint in the new mutwalli; (4) directing accounts of the wakf income coming to the hands of the defendants or which but for their wilful neglect, fraud and collusion would have come to the funds of the mosque and (5) settling a scheme for the management of the wakf. The plaint was subsequently amended when defendant 3 was added as a party on 3rd February 1936. By the amendment defendant 3 was alleged to have become a constructive trustee like defendant 2 and in place of words "defendant 2" wherever occurring in the original plaint, the words "defendants 2 and 3" were substituted.

Defendants 1 and 2 appeared and filed their respective written statements on 10th March 1932.

The case of defendant 1 inter alia is: (1) That he was not and is not a trustee or mutwalli de jure, de son tort or constructive and that the property was not at all wakf property. (2) That Khidir Buksh had no intention to make any real wakf for the service of the mosque. Even after the alleged wakfnama Khidir Buksh during his lifetime and after his death his heirs and successors all along possessed and enjoyed the properties asserting their personal right in them openly. (3) That there was no valid wakf made by Khidir Buksh by his so-called wakfnama of 1258 and there was no real appointment of mutwallis Khidir Buksh or the alleged mutwallis named in the wakfnamas never managed or administered the properties as wakf properties. That neither Khidir Buksh during his lifetime nor his heirs after his death, nor the alleged mutwallis named in the deeds ever assumed mutwalliship or acted as mutwalli of any of the properties described in Schs. A, B and C. (4) That the mosque in question was a private mosque; it was in the western por-

a tion of the residential house of Khidir Buksh and there was no access thereto from outside; only the family members of Khidir Buksh's family could say their prayer in it.

The case of defendant 2 inter alia is : (1) That this defendant being a stranger to the alleged trust the present suit under S. 92, Civil P. C., is not maintainable as against him and no relief can be obtained against him in this suit (para. 11). (2) That defendant 2 not having taken upon himself the character of a trustee he cannot be treated as trustee de jure or de son tort, or constructive and the present suit is not maintainable as
b against him : (para. 13) that this defendant is not and cannot be deemed to be trustee de son tort or liable for accounts as alleged in para. 19 of the plaint (para. 33). (3) That the plaintiff cannot get any relief against defendant 2 without a suit in a competent Court for recovery of possession of the properties in his possession on a declaration that the same are valid wakf properties. This defendant also denies the existence of any wakf as alleged in the plaint and denies the allegations of collusion and fraud etc., made in paras. 13 to 20 of the plaint. Like defendant 1, this defendant also asserts that the property has all along
c been the secular property of Khidir Buksh during his lifetime and has all along been possessed and enjoyed as such by Khidir Buksh during his lifetime and after his death by his heirs. His case also is that the mosque in question is not at all a public mosque and there was no dedication of the property to the services of this mosque.

Defendant 3 after being added as a party filed written statement on 4th April 1936. The case of this defendant is, in substance, the same as that of defendant 2. The plea special to his case is that as no consent either of the Advocate-General or of the Collector was
d taken as required by S. 92, Civil P. C., for adding him as party defendant and for amending the plaint by inserting a claim for reliefs against him under S. 92, Civil P. C., the suit was not competent as against him at the instance of the present plaintiffs. It may be noticed here that before defendant 3 was added as a party, the suit was once dismissed by the District Judge by his order dated 21st April 1932. The reason for this dismissal was this : On 21st March 1932 the learned Judge heard the suit on a preliminary issue, namely, whether a suit under S. 92, Civil P. C., was maintainable in this case without a suit for a declaration that the property was a trust property. The learned District Judge recorded the following order :

"The defendants deny that the property is a public trust at all and contend that it is their private property. The suit cannot proceed unless the plaintiffs obtain a declaration that the property is trust property. It is perfectly true that such a suit could be instituted in the Court of the Subordinate Judge. But this Court has jurisdiction over the property and no useful purpose would be served by compelling the plaintiffs to institute two suits. The plaintiffs are directed to amend their plaint and pay court-fees within a month; failing which the suit will be dismissed."

The plaintiffs did not comply with this order and consequently the suit was dismissed on 21st April 1932. The plaintiffs thereupon preferred an appeal to the High Court. This was F. A. No. 174 of 1932. On 28th May 1935 this appeal was allowed by the High Court. The decision is reported in 39 C. W. N. 1103.¹ The High Court held that in a suit under S. 92, Civil P. C., it is competent for the Court to decide the question whether the trust in respect of which the suit is brought is a public charitable trust or not so as to attract the application of S. 92, Civil P. C., and that a separate suit for the declaration that the property is trust property is not necessary. It seems that the defendants-respondents conceded this. They however sought to support the order of dismissal on another ground which was formulated in the judgment thus :

"It has been said that as defendant 2 is an alienee in respect of the trust property and the property has been sold to him, the suit is not one under S. 92 because where a stranger to a trust has been added as party to a suit which is purported to have been brought under S. 92, the suit loses its character as such. In other words, it is said, that it falls outside the range of a S. 92 suit as soon as a stranger to the trust has been made a party to the suit."

The learned Judges held :

1. That it has been consistently held throughout, in so far as this High Court is concerned, that a stranger to a trust is neither a necessary nor a proper party to a suit under S. 92, Civil P. C. : 2 C. L. J. 431;⁹ 28 C.L.J. 4.¹¹

2. That the question is to be decided on the pleadings as to whether the trust is a public charitable trust within the meaning of S. 92, Civil P. C., and whether such a declaration can in this case be made when the transferee is a stranger to the trust so as to be binding on the alienee.

3. (a) That in a suit under S. 92 a decree cannot be passed against the alienee directing him to deliver possession of the property to the plaintiff. (b) That the Court has also no power under this section to make a declaration that the property in suit is the trust property so as to bind the alienee, such a relief being also outside the scope of the section : 55 I. A. 96;²¹ 10 Rang. 342.²⁰

a 4. That the present case, however, is one where according to the allegations made in the plaint, the purchaser defendant 2 became a constructive trustee, and that the case of a constructive trustee or de jure trustee or trustee de son tort is covered by the provisions of s. 92, Civil P. C. (a) That the allegations made in the plaint do constitute defendant 2 a constructive trustee (i) that where a stranger to a trust receives money or property from the trustee, which he knows (1) to be part of the trust estate, and (2) to be paid or handed to him in breach of the trust, he is a constructive trustee of it for the persons equitably b entitled, but not otherwise: Underhill, Law of Trusts. (ii) That:

"If the alienee be a purchaser of the estate at its full value, then if he takes with notice of the trust, whether the notice be actual or constructive, he is bound to the same extent and in the same manner as the person of whom he purchased, even though the conveyance was made to him . . ."

(iii) That therefore looking to the averment of the appellants in the pleadings, defendant 2 is a constructive trustee of the wakf property. The suit cannot be said, on the allegations made in the plaint, not to be one falling within the provisions of s. 92, Civil P. C.: (Averments in paras. 13, 14, 17, 19 and 20 of the plaint were referred to in the judgment.)

The order of dismissal was set aside and it was directed that the case be sent back to the District Judge in order that he may try the suit in accordance with law. The learned Judges observed in conclusion that the allegations if proved, are quite sufficient in law to bring the suit under the provisions of s. 92, Civil P. C. As has already been pointed out, after the case thus went back to the Court of the District Judge, defendant 3 was added as a party defendant on 3rd February 1936 and the suit finally came up for hearing on 3rd April 1939 after a local investigation by a Commissioner. The Commissioner directed to relay the alleged towliatnamas (Exs. 1, 2 and 3) and the 16 documents by which the defendants acquired title to the properties and to see whether the lands given in Schs. A, B and C cover these lands. The suit was ultimately heard on 18 issues, of which issues 2, 4, 5, 6, 10, 11, 12, 13 will be relevant for the purposes of the appeal before us. These issues are:

2. Is the suit barred by Ss. 92 and 93, Civil P. C.? 4. Are the defendants, especially defendants 2 and 3 trustees de jure, de son tort or constructive? 5. Was there any valid wakf and substantial dedication made by the deeds of 1258, 1273 and 1291, and were these deeds intended to be acted upon? Were they in fact acted upon? 6. Have the plaintiffs any right or interest in the mosque? Have the plaintiffs or the Mahomedan public any right to say their prayer in it? Is it a public mosque? 10. Are the defendants

liable to be removed from their position as constructive trustees? 11. Are defendants 2 and 3 bona fide purchasers for value without notice? 12. Are the defendants liable to restore possession of the wakf properties to the legally appointed Mutwalli? 13. Did defendants 2 and 3 knowingly and fraudulently take possession of the wakf properties and are they utilising the rents, profits and income thereof for their own benefit?

The learned District Judge decreed the plaintiffs' suit on 7th July 1939 and ordered as follows:

"Defendant 1 be removed from the position of Mutwalli, and defendants 2 and 3 be removed from the position of constructive trustees. A new mutwalli be appointed; and the wakf property (C. S. plots Nos. 57, 63 and 64 and the structures standing thereon, and the southern part of C. S. plot No. 55) do vest in the mutwalli so appointed by this Court. A scheme be settled for the administration of the wakf property."

The learned District Judge held:

1. That the mosque in question was a public mosque during Khidir Buksh's lifetime and has been so since its erection.

2. (a) That in the present case the amendment has not led to the enlargement of the scope of this suit and that there is no bar to the suit proceeding against defendant 3 without fresh sanction against him. (b) That once a suit has been instituted with proper sanction, the question of amending the plaint and adding parties should be left entirely to the Court covenant as being in the best position to determine the advisability or otherwise of such amendment or addition of parties.

3. (a) That on the question whether defendants 2 and 3 are necessary and proper parties, the decision in 39 C. W. N. 1103¹ is binding so far as defendant 2 is concerned and is an authority for deciding in the affirmative so far as defendant 3 is concerned, they being constructive trustees in view of the allegations in the plaint against them. (b) That even if it be found that defendants 2 and 3 are not constructive trustees they are still necessary parties. h

4. That a valid wakf was created by the document of 1258 (Ex. 1) in respect of the properties covered by it, that this was intended to be acted upon, and was in fact acted upon that the towliatnama of 1291 (as also that of 1281) was merely intended to effect some changes in the management without affecting in any way the nature or validity of the wakf created by the document of 1258. (a) That the suggestion of the defendants that this document merely created a charge on the property, the property itself being left to the heirs of Khidir Buksh is quite unacceptable. (b) That defendant 1 was a mutwalli from birth according to the terms of the deeds: The

a transactions whereby, he says, he acquired interest in this property were by express trustees in favour of the defendant who was also then an express trustee.

5. That the properties covered by the deed of 1258 B. S. (Ex. 1) are C. S. Dags Nos. 57, 63, 64 and portion of 60. This portion of 60 has been acquired under the Land Acquisition Act.

6. (a) That defendants 2 and 3 are neither express trustees nor trustee de son tort, they did not do anything in pursuance of the terms of the wakf deed or to carry out its objects. (b) That defendants 2 and 3 acquired these *b* properties with notice of the wakf and are therefore constructive trustees in respect of the wakf property in their possession: they are not bona fide purchasers without notice, (i) that defendant 2 had himself full knowledge of the wakf when the earliest of these transactions took place—he made due enquiries, consulted pleaders, and then took lease of the property covered by Ex. O and subsequently acquired the properties covered by Exs. M and 10 with full knowledge that all these properties were included within a wakf. (ii) As permanent lessees and purchasers of wakf property with notice of wakf, defendants 2 and *c* 3 are constructive trustees in respect of the wakf properties in their possession: the whole of the property (excluding the portion covered by Miran's Towliatnama) is admittedly in the possession of defendants 2 and 3. (iii) As to defendants 2 and 3, they took possession of the wakf property knowing these to be wakf properties on the strength of certain transactions which, they must have known, were beyond the competence of the mutwallis to enter into. Such conduct must be treated as fraudulent intended to defraud the beneficiaries under the trust, namely, the worshippers. It is admitted that defendants 2 and *a* 3 are utilising the rents, profits and income of the wakf properties for their own benefit. They are liable to be removed from their position as constructive trustees.

Dr. Basak appearing for the appellants contends: (1) That as against defendant 3 the suit is not maintainable in view of the fact that no consent of the relevant authorities was obtained for this suit against him. (2) That as against defendants 2 and 3 the suit under S. 92, Civil P. C., is not maintainable, in the absence of any case that they had any duty to perform in relation to the alleged trust and that there has been any breach in the performance of that duty. (3) That even assuming that defendants 2 and 3 as purchasers of the trust property could, under certain

circumstances, be said to be constructive trustees for certain purposes, no relief contemplated by S. 92, Civil P. C., is intended as against such constructive trustees. (4) That the alleged wakf was merely a sham transaction and was an illusory one: (a) That on a proper construction of the alleged wakfnama (Ex. 1), it did not constitute a deed of wakf at all—it did not convey any property from Khidir Buksh to God Almighty. (b) That even if the document be construed as apparently having created a wakf: (i) creation of wakf was not at all intended (ii) it was never intended to give effect to the document (iii) it was never given effect to. (5) That the construction of the alleged wakfnama is at least ambiguous or equivocal and consequently in view of the fact that there was no visible change in the user of the property during the lifetime of Khidir Buksh and that thereafter the property was all along openly enjoyed and dealt with as secular property of the heirs of Khidir Buksh, the trust itself was at least a doubtful one and defendants 2 and 3 cannot be said to have taken the property with such knowledge of the trust and of its breach as would constitute them constructive trustees. (6) That even assuming that Ex. 1 created a wakf, the C. S. Dags 63 and 64 are *g* not covered by this document and are outside the alleged wakf. (7) That in any case the mosque itself being only a private family mosque, the wakf for the purposes of this mosque could not be a trust created for public purposes of charitable and a religious nature within the meaning of S. 92, Civil P. C. (8) That even assuming that the mosque was a public mosque, residence of the mutwallis of a wakf cannot be said to be a public purpose of the nature contemplated by S. 92, Civil P. C. (9) That so far as defendants 2 and 3 are concerned the claim of the plaintiffs is barred by limitation. *h*

Mr. Gupta appearing for the plaintiffs-respondents contends: (1) That in view of the decision of the High Court reported in 39 C.W.N. 1103¹ the question whether the present suit under S. 92, Civil P. C., is maintainable as against defendant 2 is no longer open and it must be held: (a) that the present suit with all the reliefs claimed against defendants 1 and 2 is maintainable as against them; (b) that, at any rate, defendant 2 is a necessary and proper party to this suit and the suit is to be decided in his presence. (2) (a) That as against defendant 3, his addition as a party defendant did not alter the scope and character of the suit and consequently the amendment did not require any consent of the

- ^a Advocate-General or of the Collector. (b) That at least his addition as a necessary and proper party to the suit did not require any consent of the Advocate-General or of the Collector and even assuming that no relief under S. 92, Civil P. C., is available against him as his addition was not with the consent of the relevant authorities, the suit is to be decided in his presence. (3) That in the facts and circumstances of this case defendants 2 and 3 became constructive trustees in respect of the properties in their possession and a suit with all the appropriate reliefs under S. 92, Civil P. C., is available against them. (4) That
- ^b the document of 1851 (Ex. 1) in clear and unambiguous terms created a wakf for the purposes of the mosque and that the C. S. Plots 63, 64 and 57 were covered by this wakf. That the evidence on the record clearly shows that the mosque was a public mosque: (a) That the subsequent towliatnamas (Exs. Z (1) and 3) and the subsequent dealings by Khidir Buksh do not show that the wakfnama was not acted upon.

The learned District Judge found that the mosque was a public mosque at the time when Ex. 1 was executed. Nothing has been placed before us which will entitle us to differ

^c from this view. There might have been some difficulty in this respect had it been necessary for us to rely on the oral evidence only at this distance of time. But Ex. 2, the towliatnama by a third party, is there and it is dated 25th June 1866. Nothing could be suggested against this document.

We shall first of all take up the question whether or not any wakf was, in fact, created in this case. It is the common case of both the parties that if any wakf was at all created, it was created by the deed of 1851 which is Ex. 1 in this case.

- Exhibit 1 has been placed before us.
- ^d Though not without some hesitation we feel inclined to hold that this document, if given effect to, created a wakf in respect of the property covered by it. The document after reciting that the executant owned and was possessed of some lakheraj land on which stood his pucca building, etc., and that he had erected a mosque (Khodai Masjid) on a plot of land previously acquired by him, proceeds to say :

"Hence I make wakf of the above-mentioned purchased lakheraj land and building for the lighting of lamps (cherag afruji) of the above-mentioned mosque and execute this towliatnama to the effect following:"

After this follows the clause appointing mutwallis of the wakf. The executant did not retain for him even the office of the mutwalli.

His daughter Meherjan and his wife Rostam alias Dana Bibi were appointed mutwallis. Standing by itself therefore, the document purported to create a wakf of the property described in it. The object mentioned is certainly a valid object to sustain a wakf : 33 ALL. 400.²

Dr. Basak contends that the terms of the document itself taken with the subsequent dealings of the property by the alleged wakif himself show that the wakif never intended to create any real wakf. According to him the transaction was a sham and illusory one, the real intention being only to tie down the property for the benefit of the family. Dr. ^f Basak refers to Ex. Z (1), Ex. 3, Ex. Q, Ex. B and the admitted subsequent dealings of the property by the heirs of Khidir Buksh.

It is not disputed that in order to make out whether the wakf in any particular case is a real one or not, the intention of the settlor is a relevant consideration. Indeed, the reality or otherwise of the transaction will depend upon whether or not the wakif intended to divest himself of the ownership of the property : 59 Cal. 402³ at pp. 424-28, A. I. R. 1930 P. C. 255 = 35 C. W. N. 324²⁶ at page 332.

In examining the intention of the alleged ^g wakif in this respect there is one great risk which must be kept in mind and must be avoided by all means. It is the risk of making a confusion between the Judge's subjective view of the justice of the law itself and his view of the character of the transaction really intended by the man. Here, for example, the law allows a Mussalman to appoint himself and his descendants and heirs to be the mutwallis of the wakf. He may appoint the members of his own family to be the mutwallis and may lay down a scheme for the administration of the wakf and for succession to the office of the mutwalli. He may empower the ^h mutwallis including himself to sell or mortgage the property or to lease it out for any period. He may fix remunerations for the mutwallis and may make the office of the mutwallis descendable to his descendants in perpetuity. In short while creating a wakf a hanafi Musalman may divest himself of one character and assume another character retaining practically the same power. This by itself, should not lead a Judge to an inference that the man did not intend to divest himself of the property and did not intend to create a real wakf.

26. (1930) 17 A.I.R. 1930 P. C. 255 : 128 I.C. 647
35 C. W. N. 324 (P. C.), Mohammad Ali Mohammad Khan v. Mt. Bismullah Begam.

a The document (Ex. 1) on the face of it creates a wakf. Dr. Basak contends that the only object of the wakf that is specified in the deed is the lighting of lamps in the mosque and this involves an insignificant expenditure. Even this insignificant expenditure is left at the absolute discretion of the mutwallis. Practically the whole of the property is reserved for the enjoyment of his own family members. The document says :

"If other issues are born to me they also will enjoy the above-mentioned buildings and lands as mutwallis."

b Later on as soon as sons are born to Khidir Buksh he executes Ex. Z (1) to make the position of these sons secure. A son dies and Khidir Buksh comes forward with Ex. 3 and this time makes a partition of the property amongst the members of his family. Then again, by Ex. Q Khidir Buksh himself, it is alleged, treats this property as his own secular property and makes a gift of a portion to his wife Rostam Bibi. According to Dr. Basak all this show that Khidir Buksh never intended to divest himself of the ownership and the alleged wakf was not acted upon during his lifetime. After his death his heirs admittedly treated this property as their own secular property.

c These are certainly weighty considerations. Exhibit Q, however, does not deal with any of the properties covered by Ex. 1. Plot No. 1 of Ex. Q is the only property alleged to be covered by Ex. 1. This plot No. 1 is admitted to be the present Cadastral Survey plot No. 56. The learned District Judge found that this Cadastral Survey plot No. 56 was not covered by Ex. 1 and, as we shall show later on, this view of the learned Judge is correct. Exhibit Z (1) and Ex. 3 both recite the property as comprising the wakf. It may be that after having created the wakf in 1851, Khidir Buksh had no legal right to make fresh appointment of mutwallis or to interfere with the user by the mutwallis. But as a matter of fact he did so interfere and these documents do not show anything worse than that. The so-called partition made by Ex. 3 no doubt seems to indicate as if the author thereof considered himself still not divested of the ownership. He makes provision for separate enjoyment by his descendants after his lifetime. These no doubt might lead to the inference that Khidir Buksh did never intend to divest himself of the ownership when he executed the document of 1851. But there was that declaration of dedication in Ex. 1 and this was repeated in all the subsequent docu-

ments. The subsequent dealing by the heirs of Khidir Buksh do not, in my opinion, affect the question. If there was a real wakf then these dealings were in clear breach of trust. Such dealings will be no evidence of the intention of the original settlor. After thus giving our anxious consideration to the facts in this case though we cannot say that the position is absolutely clear, yet we are not in a position to declare this wakf as sham and illusory. In our opinion there is ample material on the record to establish that Khidir Buksh intended by the transaction evidenced by Ex. 1 to divest himself of the ownership of the properties covered by the deed and that as a matter of fact he divested himself of such ownership by the transaction and created a real and operative wakf.

As regards the extent of the properties covered by Ex. 1, we are in agreement with the finding arrived at by the learned District Judge. The appellants before us contend that the cadastral survey dags 63 and 64 are not covered by the deed of wakf but that the wakf extends southwards and covers the Cadastral Survey Plot No. 56. Mr. Guha argued this point for the appellants and he mainly relied on the map of 1859 and contended that on a comparison of the boundaries given in Exs. 1, 4 and Q with the help of the map of 1859, the Cadastral Survey Plot No. 56 will be found covered by Ex. 1 and consequently taking the admitted area of the wakf property as given in Ex. 3 (namely land measuring 39 yards east to west and 45 yards north to south), Cadastral Survey Plots Nos. 63 and 64 will be outside the wakf. The whole argument of Mr. Guha is based on the location of what is named as "Chowdewari" in Ex. 1. On the land, dedicated by Ex. 1 stood the 'Chowdewari' according to the recital in that document. This was in 1851. The southern boundary of the land covered by Ex. 1 is given as 'the land of Nidus Saheb'. In 1861 Khidir Buksh purchased the land of Nidus Saheb from one Mr. Jakin Gregory Nicholas Pogose. This is Ex. 4. The northern boundary of the land sold by this document is given as "the immediate south of the pucca dewari of Khidirbux Khansama." If the 'pucca dewari' be on Cadastral Survey Plot No. 57 then this plot must be the Cadastral Survey Plot No. 56 and obviously it was not included in the wakf. Mr. Guha contends on the strength of the map of 1859 that this pucca dewari was on the C. S. Plot No. 56 and consequently the land sold by Ex. 4 was the plot to the south of Cadastral Survey Plot No. 56. So, this plot 56 was covered by Ex. 1. Mr. Guha however admits that Plot

- a No. 1 of Ex. Q is Cadastral Survey Plot No. 56. Exhibit Q is of the year 1884. In its description of plot No. 1, it does not mention any 'chowdewari' standing on it. These documents consistently point to Cadastral Survey Plot No. 57 as the plot containing the 'chowdewari.' The map of 1859 might be of some help to contradict all this only if we were sure that on it the buildings and structures were depicted according to some scale. But the map does not even give the different plots. It may be noticed in this connexion that the defendants obviously felt no difficulty as to the extent of the land covered by Ex. 1 as is obvious from
- b the fact that they did not in their written statement make any case that any of the properties acquired by them was not covered by the document.

We feel some difficulty in saying that defendant 2 had full knowledge of the fact that the properties acquired by him were covered by the wakf. No doubt the very documents relating to the transactions by which he acquired the property point to the fact that he had knowledge of the alleged deed of wakf and knew fully well that the property in question was covered by that document. These documents are Exs. Q, 15, M, I and 10 in this

c case. Exhibit O is the document by which the Cadastral Survey Plot No. 64 was acquired by defendant 2 from defendant 1 and another in 1917. Exhibit 15 is the indemnity bond executed by defendant 1 and that other in that connexion. Exhibit M is the sale deed by which western part of Cadastral Survey Plot No. 63 was acquired by defendant 2 from defendant 1 in 1925. Exhibit I is the bond by which defendant 1 mortgaged the rest of the Cadastral Survey Plot No. 63 and the Cadastral Survey Plot No. 57 to defendant 2 in 1925 on the same date (8th October 1925) on which Ex. M was executed. Exhibit 10 is the sale

d deed by which defendants 2 and 3 purchased this mortgaged property (the Cadastral Survey Plot No. 57 and the eastern portion of 63) from defendant 1 in 1929. Exhibit O recites

"that Sheikh Khidir Buksh while in possession and ownership of the lands described in the schedule built a mosque in the locality and in connexion with creating a wakf of the lands of the schedule below and of other properties executed a registered tauliatnama on 10th Jaistha 1291 B.S. and appointed his son as mutwallis."

The tauliatnama referred to in this recital is Ex. 3 in this case and there is no dispute that plot No. 1 of Ex. 3 is the mosque and plots Nos. 2 and 3 are the lands of Ex. 1. This tauliatnama refers to the wakf deed and recites the property as the wakf property thus created. Exhibit O shows that the parties thereto

had before them this tauliatnama. The document says :

"On a reference to the abovementioned tauliatnama dated 15th Jaistha 1291 B. S. itself the properties enumerated in that deed cannot be regarded as legal and valid wakf properties."

How the parties were satisfied as to this we do not know. But this much must be said that the creation of wakf by the alleged wakfnama was not beyond all doubt. It is clear that the parties had full knowledge of the contents of the document and of the fact that they were entering into a transaction relating to a property covered by that document. Yet if the document itself was of doubtful operation as creating a valid wakf it is difficult to say that defendant 2 had knowledge of the wakf when he acquired this property. The knowledge is the certain perception of truth. It is something more than a mere suspicion and perhaps is more than belief. Knowledge is firm belief. Belief includes things which do not make a very deep impression on the memory. The difference may only be in degree but still there is this difference. Knowledge is clear perception of fact.

That defendant 2 had a strong suspicion that Ex. 1 might have created an operative wakf is evident from his conduct as evidenced by the transactions themselves. In Ex. O, for example, in its earlier part the document takes care to say that the wakif provided that the mutwallis would have power to induct tenants for the purpose of the mosque, and later on it carefully recites the necessity for the exercise of this power. With all these precautions, defendant 2 purports to take permanent lease of the land, which the document itself declares to be covered by the wakf, from two persons who would be mutwallis if there were a real wakf. The premium paid is Rs. 2700 and the rent reserved is only 1-4 per annum. He takes an indemnity bond from the lessors by way of further security. Exhibit M also shows the same thing. The wakf is recited and it is also recited how the heirs of the wakif are dealing with the property as their own secular property. It is again recited that on the face of the tauliatnama of 1291 B. S. the properties mentioned cannot and could not be deemed as legal and valid wakf properties. It then says :

"As a matter of fact the heirs of Khidir Buksh and the mutwallis named and proposed in the abovementioned deed have not treated the property as wakf property and have been dealing with them in any way they like and making transfers."

But if there was a real and operative wakf all these dealings would merely be breaches of trust and would not change the character

a of the property. Hence immediately after the above recitals in Ex. M, we find a cautious recital of necessity for the transaction created by the requirement of the very mosque :

"I am not bound and liable to defray the expenses of the abovementioned mosque from the profits of the abovementioned lands. Still I the vendor think it proper to spend the profits arising out of the abovementioned lands for the necessities of the abovementioned mosque. The lands of the schedule given below yield very little as rent. The expenses of the mosque cannot be met by that. For this reason some money being needed. . . ."

b he sells the property and defendant 2 purchases. On the same date the rest of the wakf property is mortgaged to the same person by Ex. I which four years later is sold to him by Ex. 10. This Ex. 10 also contains recitals about the illusory character of the wakf. It says :

c "As a matter of fact Khidirbuksh himself instead of treating the abovementioned property as wakf property has dealt with it in the manner he liked." There is however no evidence on the record to support this recital. We are thus of opinion : (1) That Khidirbuksh by Ex. 1 created a valid and operative wakf for the purposes of the mosque; (2) That the mosque was and still is a public mosque; (3) That Ex. 1 covers the lands of the Cadastral Survey Plots Nos. 63, 64 and 57; (4) That defendants 2 and 3 acquired the lands of this wakf for valuable consideration (a) with full knowledge that the lands were covered by Ex. 1 and (b) with strong suspicion that Ex. 1 created a valid wakf.

d In my opinion in the circumstances of this case it is not possible to ascribe full knowledge of the wakf to this defendant. It is not disputed that if there were a real wakf, defendant 1 would have been one of its mutwallis. Nor can there be any doubt that so far as this defendant 1 is concerned, the suit under S. 92, Civil P. C., is competent and a case as against him for giving the reliefs claimed under that section in the present suit has been made out. The decree of the learned District Judge, so far as defendant 1 is concerned, therefore, must stand. As defendant 1 was a trustee no question of limitation can arise so far as he is concerned.

The question now to be considered is whether the reliefs claimed under S. 92, Civil P. C., in the present case can be obtained by the plaintiffs as against defendants 2 and 3 or either of them. Section 92, Civil P. C., lays down :

"(1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-

General or two or more persons having an interest in the trust may institute a suit, whether contentious or not, in the principal civil Court. . . . to obtain a decree. (a) removing a trustee (b) appointing a new trustee (c) vesting any property in a trustee (d) directing accounts and inquiries (e) declaring what proposition of the trust property or of the interest therein shall be allocated to any particular object of the trust, (f) authorizing the whole or any part of the trust property to be let, sold, mortgaged or exchanged, (g) settling a scheme, or (h) granting such further or other relief as the nature of the case may require.

2. no suit claiming any of the reliefs specified in sub-s. (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section."

In order to make the reliefs specified in sub-s. (1) of S. 92, Civil P. C., available against any person, the following requirements must be present, namely :

1. There must be a trust: (a) express or constructive; (b) created for public purposes, (i) of a charitable or (ii) religious nature.

2. The claim to the reliefs must be founded on (a) a breach of the trust, or (b) a necessity for the administration of the trust.

3. So far as the reliefs specified in cls. (a) and (d) are concerned, the party against whom these reliefs are claimed must be a trustee, express or constructive : (i) who has been guilty of the breach of trust or (ii) whose duty it was to administer the trust.

It cannot now be disputed that a public wakf is a trust for public purposes of a charitable or religious nature within the meaning of this section and that if the reliefs specified in the section are claimed with reference to a wakf, the section applies : 55 I. A. 96.²¹

It should also be taken as settled : 1. That a suit which prays for any of the reliefs mentioned in S. 92, Civil P. C., in respect of a trust for public purposes of a charitable or religious nature can be instituted only in accordance with the provisions of that section : 55 I. A. 96.²¹ at p. 105. 2 (a) That all suits founded upon any breach of trust for public purposes of a charitable or religious nature, irrespective of the relief sought, do not require to be brought in accordance with the provisions of S. 92, Civil P. C. : 55 I. A. 96.²¹ at p. 102. (b) That if a suit does not claim any such relief as is specified in sub-s. (1) of S. 92, that section is no bar to the maintainability of the suit without the sanction of the Advocate-General and in the Court of the Subordinate Judge : 55 I. A. 96.²¹ at p. 105. 3. That a relief or remedy against strangers to the trust is not within the scope of S. 92, Civil P. C. Such a relief is not included in cl. (h) under the general words "further or other relief" : 55 I. A. 96.²¹ at p. 105; (a) be-

- a cause the words 'further or other relief' must on general principles of construction be taken to mean relief of the same nature as cls. (a) to (g); (b) because, if the words be construed as meaning "any relief other than (a) to (g) that the case of an alleged breach of an express or constructive trust may require in the circumstances of any particular case," then such construction would cut down substantive rights which existed prior to the enactment of the Code of 1908, and it is unlikely that in a Code regulating procedure the Legislature intended, without express words, to abolish or extinguish substantive rights of an important nature which admittedly existed at that time: 55 I. A. 96²¹ at p. 103.

The substantive rights referred to above are obviously the reliefs that were available to a party as of right without any consent of anybody.

- In the above case their Lordships of the Judicial Committee also noticed the divergence of the judicial opinion in India on the question whether third parties could or should be made parties to a suit under S. 92. Their Lordships, however, noticed that 'the general current of decisions was to the effect that even if such third parties could properly be made parties under S. 539 of the Code of 1882, no relief could be granted as against them. In the case before us, there is no question that the reliefs claimed are those coming under sub-s. (1) of S. 92, Civil P. C. The question is not (i) whether any other relief was available against defendants 2 and 3 and, (ii) if so, whether such a relief could also be sought for in this suit, but (iii) whether the reliefs claimed in the suit are available against them.

- The claim to the reliefs in the present case is founded on: (1) the alleged breach of trust by defendant 1 (plaint para. 22); (2) (a) the alleged procurement of breach of trust by defendants 2 and 3 (plaint paras. 14 and 19) (b) the alleged breach of constructive trust and of trust de son tort by defendants 2 and 3 (plaint paras. 17 and 19). (4) The alleged necessity for the administration of the trust both of the original express trust and of the constructive trust resulting from the breach of the original express trust.

So far as defendants 2 and 3 are concerned the reliefs specified in cls. (a) and (d) of sub-s. (1) of S. 92, Civil P. C., are claimed against them on the footing: (1) that they became constructive trustees (a) by reason of their getting the property by making defendant 1 to commit breach of trust by the exercise of undue influence (b) by reason of their purchas-

ing the wakf property with full knowledge (i) that it was such wakf property and (ii) that it was being transferred to them in breach of the trust, — such breach having been procured by defendants 2 and 3 by the exercise of undue influence.

Mr. Gupta contends that so far as defendant 2 is concerned, the question is no longer open for determination in the view of the decision of this Court in 39 C. W. N. 1103;¹ — it is res judicata between the parties. Mr. Gupta relies on the decisions in 48 I. A. 187²⁷ and 11 I. A. 37.²⁸

Mr. Gupta further contends that irrespective of the question whether any other relief is available against these defendants in respect of the property in their hands, as soon as it is found that there is a trust of the kind contemplated by the section and that a particular property appertains to that trust, the Court can at least grant the relief contemplated by cl. (c) of sub-s. (1) of S. 92, Civil P. C., as against defendants 2 and 3 as well. His further contention is that if defendants 2 and 3 took the trust property with full knowledge that it was trust property and that it was being transferred in breach of trust then they became constructive trustees and in that case even the relief under cl. (a) would be available against them. Apart from the question whether or not the decision in 39 C. W. N. 1103¹ would operate as res judicata, so far as this question is concerned, Mr. Gupta relies on this decision also as an authority in support of his contention.

In order to see the exact scope of the decision in 39 C. W. N. 1103¹ we must not forget what was the matter for decision before the High Court on that occasion. As has been stated above, the present suit under S. 92, Civil P. C., was dismissed by the learned District Judge as he was of opinion that as soon as the defendants denied that the property was a public trust and contended that it was their private property, the suit under S. 92, Civil P. C., became incompetent. On appeal to the High Court defendant 2 as respondent did not seek to support the order of dismissal on this ground. It was conceded that the suit could not be dismissed on this ground. Defendant 2, however, sought to support the dismissal of the suit so far as he was concerned on the ground that he being a stranger to the alleged trust was neither a necessary nor a

27. ('21) 8 A. I. R. 1921 P. C. 11; 60 I. C. 631; 48 Cal. 499; 48 I. A. 187 (P. C.), *G. H. Hook v. Administrator General of Bengal*.

28. ('84) 6 All. 269; 11 I. A. 37; 4 Sar. 489 (P. C.), *Ram Kirpal v. Rup Kuari*.

a proper party to the suit under s. 92, Civil P. C., and none of the reliefs claimed in the suit was available against him. The learned Judges who heard the appeal upheld this contention of defendant 2 in so far as it was only an abstract proposition of law. But so far as the present suit is concerned, the learned Judges considered it to be one where according to the allegations made in the plaint, the purchaser, defendant 2, became a constructive trustee and a trustee de son tort. Consequently, the present suit under s. 92, Civil P. C., was held to be competent as against him and it was decided that if the allegations made in the plaint be established, then the reliefs claimed in the suit would be available against him.

The relevant allegations which if established would make defendant 2 a constructive trustee were referred to by the learned Judges to be those contained in paras. 13, 14, 17, 19 and 20 of the plaint.

In para. 13 of the plaint it was alleged that defendant 1 in collusion with defendant 2 transferred the wakf properties to defendant 2. No such collusion has been established in this case.

c In para. 14 of the plaint it was alleged that defendant 2 taking advantage of the involved position of defendant 1 got him under his unfair and undue influence and by the use thereof defendant 2 procured defendant 1 to commit breach of trust in respect of the wakf properties. There is absolutely nothing on the record to establish these allegations of undue influence and of procuration of breach of trust by defendant 2.

d In para. 19 of the plaint it was alleged that defendant 2 knowingly and fraudulently took possession of the wakf properties and had been utilising the income thereof in collusion with defendant 1. No fraud or collusion as alleged here has been established in this case. As to the knowledge, it has already been pointed out that defendant 2 no doubt took the property with knowledge of the fact that it was covered by Ex. 1. There was however some doubt as to whether or not the document at all created a real wakf. In this paragraph it was also alleged that defendant 2 became liable to accounting as a trustee de son tort. No evidence has been adduced in this case to show that defendant 2 ever took upon himself the duty of the trustee. There is absolutely nothing on the record to make him a trustee de son tort.

In my opinion the averments in the pleadings which if established would have made defendant 2 a constructive trustee according to the decision in 39 C. W. N. 1103¹ have not

been established by the evidence on the record and consequently that decision does not entitle the plaintiffs to obtain the reliefs claimed as against defendant 2. The law relating to trust is not the same in India as in England. The law in India recognises no distinction between legal and equitable estates: I. A. Sup. 47²⁹ at page 71. This was pointed out by their Lordships of the Judicial Committee also in 30 I. A. 238.³⁰ Their Lordships observed:

"The law of India, speaking broadly, knows nothing of that distinction between legal and equitable property in the sense in which it was understood when administered by the Court of Chancery in England."

By the law of India there can be but one owner and where the property is vested in a trustee the owner must be the trustee: 58 I. A. 279.³¹ This is the view embodied in the Indian Trusts Act, 1882, ss. 3, 55, 56, etc. A trust is an obligation annexed to the ownership of property and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him for the benefit of another, or of another and the owner. The interest of the beneficiary of a trust is defined in s. 3, Trusts Act, not as an interest in the trust property but as a right against a trustee as owner of the trust property. According to the definition of trust and of beneficiary given in s. 3, Trusts Act, 1882, what in English law would be the equitable estate of the cestui que trust is only the benefit of an obligation annexed to the ownership of property. This obligation of a fiduciary character can under certain circumstances be enforced even against a purchaser for consideration. What the cestui que trust has is the right to call upon the trustee and, if necessary, to compel the trustees to administer the property so as to give him his dues according to the provisions of the trust. The position here in India in this respect is like that in American law: 1931 A. C. 212.³²

Whatever may be the position of a purchaser from a trustee who is the legal owner of the property in the eye of the law, a purchaser from a mutwalli of Musalman wakf is in a very different and precarious position. Unless the mutwalli is expressly empowered by the deed of wakf to do so, he has no power,

29. ('72) I. A. Sup. Vol. 47 : 18 W. R. 359 : 9 Beng. L. R. 377 : 3 Sar. 82 (P.C.), *Jatindra Mohan Tagore v. Ganendra Mohan Tagore*.

30. ('04) 31 Cal. 57 : 30 I. A. 238 : 8 C. W. N. 41 : 8 Sar. 554 (P.C.), *Webb v. Macpherson*.

31. ('31) 18 A. I. R. 1931 P. C. 196 : 133 I. C. 705 : 10 Pat. 851 : 58 I. A. 279 (P.C.), *Chhatra Kumari v. Mohan Bikram Shah*.

32. (1931) 1931 A. C. 212 : 100 L. J. K. B. 170 : 144 L. T. 508 : 15 Tax. Cas. 693 : 47 T. L. R. 171, *Garland v. Archer Shee*.

a without the permission of the Court, to mortgage, sell or exchange wakf property or any part thereof and a transferee from him acquires no interest in the property by such transfer. Similarly, a mutwalli has no power to grant a lease of wakf property permanently unless he has been expressly authorised by the deed of wakf to do so, or unless he has obtained the leave of the Court to do so. In the present case neither the deed of wakf conferred any such power on the mutwalli, nor did he take any leave of the Court. Unlike a transferee from a trustee in English law the transferee from a mutwalli gets nothing by the transfer. He becomes a trespasser pure and simple irrespective of the question of any notice or knowledge.

Then again a mutwalli is a trustee not in the sense of having in him any legal ownership of the property. He no doubt has an obligation arising out of a confidence reposed in and accepted by him. But as he himself has no title to the ownership and no power to alienate the property, his act of transfer of the property may not affect this obligation at all so as to impose it on the transferee of the property and make him a constructive trustee. Such a transferee has consistently been held c by all the High Courts in India to be a person against whom the reliefs specified in sub-s. (1) of S. 92, Civil P. C., are not available. A mutwalli himself is a trustee as the result of some projection of ideas. To clothe an alienee from him who is otherwise a trespasser pure and simple with the constructive trusteeship so as to make the special reliefs under S. 92, Civil P. C., available against him will be a further projection. We constantly cover things up so to speak, by our readymade images and thus conceal from ourselves what is new and distinctive in them.

d In my opinion none of the reliefs claimed in the present suit under S. 92, Civil P. C., is available against defendants 2 and 3 and consequently the suit as against them must be dismissed. I am further of opinion that as against defendant 3 the suit is liable to be dismissed also on the ground that the suit as against him is not competent at the instance of the present plaintiffs in view of the fact that no consent of the relevant authorities under S. 92 or S. 93 was taken for the purpose of adding him as party defendant. The amendment certainly enlarged the scope of the suit inasmuch as it sought reliefs in respect of the properties in his possession and these reliefs were claimed as against him and by his removal as a constructive trustee. In the result I agree that the appeal should be allowed and

I concur in the order made by my learned brother.

R.K.

Appeal allowed.

A. I. R. (31) 1944 Calcutta 189

KHUNDKAR J.

Gobind Das Bhattar — Petitioner

v.

Gajanand Pandey — Opposite Party.

Petition in suit No. 1688 of 1939, Decided on 17th August 1942.

Legal Practitioner—Solicitor's lien for costs — Rule of common law indicated — Moneys in hands of solicitor earmarked for specific purpose — Solicitor's lien cannot prevail. f

The common law rule which governs what is known as the solicitor's particular lien is founded on the principle that the solicitor is entitled to have his costs out of the property obtained for his client by the solicitor's exertions. That rule has no application when the property is part of a fund which has come into the solicitor's hands for a particular purpose. Where moneys in a solicitor's hands have been earmarked for a specific purpose, the solicitor's lien for costs cannot intervene to defeat it: *Case law discussed.* [P 192e,f]

The plaintiff instituted a suit on 17th August 1939 for recovery of a sum of Rs. 3694-11-0 on a signed adjustment of account and on 18th August 1939 applied for attachment before judgment of a decree which the defendant had obtained against one P. On that date the Court made an interim order on the application restraining the defendant from withdrawing the sum of Rs. 3694-11-0 out of the amount that may be realised in execution of the defendant's decree against P. Then on 31st August 1939 the Court made an order by which the plaintiff's application for attachment before judgment was adjourned and the interim injunction against the defendant was discharged on the defendant's undertaking to deposit with his attorney Rs. 3700 if money was realised by execution of or otherwise on account of the decree obtained by the defendant against P. The money was to be held by the attorney until further orders on the plaintiff's application for attachment before judgment. Subsequently, the defendant realised a sum of Rs. 1500 from P in respect of his decree against P. This amount came into the hands of the defendant's attorney. The plaintiff having obtained h decree in the suit against the defendant applied in execution to recover the amount in the hands of the defendant's attorney. The attorney claimed a lien over that amount for his costs of the suit in which the decree against P was obtained by the defendant:

Held that the only purpose for which the money was to be deposited with the attorney was that the attorney should hold it as security for the plaintiff's claim should the latter be successful in his suit against the defendant. The attorney therefore assumed the character of a stake-holder and his possession was impressed with a trust. His lien for costs could not therefore prevail. [P 193f]

N. N. Bose — for Petitioner.

J. N. Mazumdar — for Opposite Party.

Order. — This is an application for payment to the petitioner of a sum of Rs. 1500 now lying in the hands of an attorney who

a acted for the defendant in a suit in which the petitioner is the plaintiff. It is opposed by the attorney who claims a lien for his costs on the sum in question. The relevant facts are as follows: The petitioner instituted a suit on 17th August 1939 for recovery of a sum of Rs. 3694-11-0 on a signed adjustment of account. In that suit on 18th August 1939, he applied for attachment before judgment of a decree which the defendant had obtained against one Prahladram on 8th August 1939, in suit No. 1000 of 1938. On that date McNair J. made an interim order on the application restraining the defendant from withdrawing the sum of
 b Rs. 3694-11-0 out of the decretal amount in suit No. 1000 of 1938 by execution or otherwise. Then, on 31st August 1939 McNair J. made the following order:

"Without prejudice to the contention of the parties, application adjourned after the vacation. Interim order discharged on the defendant's undertaking to deposit with his attorney Mr. M. G. Poddar Rs. 3700 (Rupees three thousand and seven hundred only); if money is realised in execution of the decree or otherwise on account of the decree obtained by the defendant in suit No. 1000 of 1938 to be held by Mr. M. G. Poddar subject to further order on this application."

It is clear that the interim order was discharged, upon the defendant undertaking to deposit with his attorney Mr. M. G. Poddar a
 c sum of Rs. 3700 out of moneys to be realised by him in execution of the decree in suit No. 1000 of 1938, which sum was to be held by Mr. Poddar subject to further orders on the application. On 1st September 1939, a sum of Rs. 1500 was realised by the defendant in terms of a settlement arrived at between him and Prahladram, the defendant in suit No. 1000 of 1938, and this amount came into the hands of Mr. Poddar on that date. On 3rd June 1941 the plaintiff's attorney Mr. S. K. Dutt wrote to the defendant's attorney Mr. Poddar to enquire if the defendant had realised any further sum in execution of his decree
 d in suit No. 1000 of 1938. In reply to this letter Mr. Poddar took up the attitude that the plaintiff had abandoned his application inasmuch as he had never brought it to final hearing after the long vacation of 1939, and he claimed that he was entitled to appropriate the sum of Rs. 1500 realised in execution of the defendant's decree in suit No. 1000 of 1938 towards his costs. The plaintiff's suit was finally disposed of on 10th June 1942 by Gentle J. who granted the plaintiff a decree for Rupees
 e 4272-12-6 with interest at 6 per cent. With regard to the sum of Rupees 1500 held by Mr. Poddar, Gentle J. made an order in the following terms:

"No order in respect of the monies in the hands of Mr. M. G. Poddar, attorney for the defendant, which

he holds pursuant to the agreed order of 31st August 1939, upon Mr. Poddar undertaking to continue to hold the monies in his hands for one month, and if within that time a substantive application is issued and served by the plaintiff in respect of that money to continue to hold it until further order of the Court."

On 9th July 1942, the plaintiff took out the present summons on the defendant as also on his attorney Mr. Poddar for an order for payment to the plaintiff of the aforesaid sum of Rs. 1500 and any other moneys that have been realised or may hereafter be realised in execution of the defendant's decree in suit No. 1000 of 1938. Along with his affidavit in support of the summons the plaintiff presented a tabular statement under O. 21, R. 11 and there can be no doubt that he is now seeking to realise this sum of Rs. 1500 which is in the hands of the defendant's attorney by way of execution of the decree which he obtained from Gentle J. in his suit against the defendant. The application is resisted by the judgment-debtor Gajanand's attorney Mr. Poddar who claims a lien on these moneys for costs incurred by him in suit No. 1000 of 1938 (*Gajanand Panday v. Prahladram*).

This matter is of importance to attorneys and has been argued at some length. The learned Senior Standing Counsel, who appears
 g for Mr. Poddar, has opposed this application on two grounds, firstly, that the order of McNair J. has spent itself and is no longer binding, and, secondly, that in any event the attorney's lien has priority over the claim of the plaintiff to money of the defendant in the attorney's hands.

In support of the first point it has been argued that the proceeding in which McNair J. made the order of 31st August 1939, was an application for attachment before judgment presented by the plaintiff on 18th August 1939, and it was not finally disposed of by any order. But that application no longer lies,
 h because judgment has been delivered in the applicant's suit by Gentle J. on 10th June 1942. The duration of the order of 31st August 1939 has to be determined by the character of the proceeding in which it was made and by the terms of the order itself. The order was made "subject to further orders on this application," and the application was adjourned till after the vacation. Thereafter the application was never brought up, in fact nothing was done before judgment in the suit was delivered on 10th June 1942, and that judgment having disposed of the suit itself the order of McNair J., which was an interlocutory order, must be deemed to have spent itself or to have been thereby superseded.

- a It has to be conceded that the present application is one for the execution of the decree. It must also be conceded that the original application of 18th August 1939, was adjourned and that no order subsequent to the order of 31st August 1939, was passed upon it while the matter was in the interlocutory stage. But it does not follow that the present application is not maintainable, or that the order of 31st August 1939, has spent its force or stands superseded. That order was mentioned before Gentle J. on 10th June 1942, after he had delivered judgment in the suit, whereupon he gave the direction already quoted above.
- b It amounted to a recognition of the fact that the attorney was holding the money pursuant to the order of 31st August 1939, and a continuation of the status quo in respect of the money for a further period of one month, within which time a fresh application might be presented. The character of the attorney's possession was in no way altered. The present application is a fresh application, and it has been made within a month of Gentle J.'s order. I see no reason for holding that on this application the applicant's claim to the money in the hands of the attorney may not be maintained, or that the judgment in the suit had the effect of vacating the order of 31st August 1939. This disposes of the first point taken by the learned Senior Standing Counsel.

His second contention is as follows: The money came to be held by the attorney under the agreed order of 31st August 1939. That order was that the money was to be held subject to further orders on the plaintiff's application for attachment before judgment which was being adjourned. No attachment was directed. The defendant was not ordered to furnish security. It was not said that the money was to be held by the attorney freed of his lien for costs. Moreover, the money did not come into the hands of the attorney by virtue of this order. So far as that was concerned McNair J. was merely recording an agreement that the defendant would deposit with Mr. Poddar a sum of Rs. 3700 if money was realised in execution or otherwise on account of the decree which the defendant had obtained in his suit No. 1000 of 1938 against Prahladram. The making of the deposit with the attorney was conditional on money being realised by the defendant from Gajanand. Actually the money was realised on the following day, but it was realised through the exertions of the attorney in the course of the proceedings in execution of the defendant's decree against Prahladram in suit No. 1000 of 1938. It is the defendant's money

in the attorney's hands obtained by the diligence of the latter. It is therefore subject to what is known as the attorney's particular lien at common law.

In support of this line of reasoning the learned Senior Standing Counsel has cited Halsbury's Laws of England, Vol. 31, Arts. 264 and 271, in which the rules relating to a solicitor's liens at common law over the property of his client are stated. The kind of lien invoked is described in Art. 271 :

"A solicitor has at common law, apart from statute, a lien, which may be actively enforced, over a fund or the proceeds of a judgment recovered for the client in the course of litigation or arbitration by the solicitor's exertions, This lien is a particular lien. It is not therefore available for the general balance of account between the solicitor and the client, but extends only to the costs of the proceedings in which the property is recovered"

The learned Senior Standing Counsel has relied upon a number of decisions which relate to the application of this rule in India, in which the solicitor's lien was given effect to, and in which it was stated that this subject is governed by the law as it existed in England before the passing of 23 and 24 Vic., Chap. 127 (The Solicitors Act, 1860). 49 Bom. 505¹ was a case in which the plaintiffs, in a suit in which they had obtained a decree, attached in execution thereof a decree which the defendants had obtained in another suit against a third party. Thereafter the solicitors of the defendants obtained charging orders for their costs over moneys paid to the Sheriff as a result of the execution proceedings. It was held that the solicitors were entitled to enforce their lien in priority to the attaching judgment creditor. In 51 Bom. 855² the relevant facts were similar to those in the last mentioned case, except that the decree obtained by the defendants was a decree for costs. The decision in 49 Bom. 505¹ was approved.

46 Cal. 1070³ was a decision on an application by the solicitor of the defendant in a suit in which certain costs had been awarded to his client against the plaintiff. It was held that the solicitor's lien for his costs could be dealt with in a summary proceeding, and that though the power was discretionary, it ought, in the circumstances of that case, to be exercised in favour of the solicitor and against

1. ('25) 12 A. I. R. 1925 Bom. 351 : 88 I. C. 81 : 49 Bom. 505 : 27 Bom. L. R. 556, Ved and Sopher v. R. P. Wagle & Co.
2. ('27) 14 A. I. R. 1927 Bom. 542 : 105 I. C. 383 : 51 Bom. 855 : 29 Bom. L. R. 1196, Tyabji Dayabhai & Co. v. Jetha Devji & Co.
3. ('20) 7 A. I. R. 1920 Cal. 122 : 54 I. C. 691 : 46 Cal. 1070, Harnandroy Foolchand v. Gootiram Bhuttar.

a the plaintiff. In 63 Cal. 746⁴ the attorney for the plaintiffs, in a suit in which the defendant had been ordered to pay the taxed costs and had paid the same into Court, applied for permission to withdraw from that sum the amount of the attorney's costs. The defendant contended that he was entitled to set off against the costs payable by him the costs payable to him by the plaintiff in another suit. It was held that the attorney's claim must prevail over that of the defendant both under the common law, and by reason of O. 8, R. 6, Civil P. C., which provides that no set-off shall affect the lien, upon the amount decreed of any pleader in respect of the costs payable to him under the decree. 43 C. W. N. 290⁵ related to an application by an attorney for payment to him of his costs out of moneys lying with the Calcutta Improvement Trust Tribunal under a consent decree. A client of the attorney had become entitled to Rs. 16,000 out of the said moneys, but had thereafter been adjudicated insolvent. In a contest between the Official Assignee and the attorney, it was held that as the property was procured for the client by the labour of the attorney, the latter's lien for his costs prevailed notwithstanding the bankruptcy of the client.

c 43 Cal. 932⁶ was an application on behalf of a plaintiff's attorney claiming that he had a lien on a judgment obtained by the plaintiff against the defendant, and that his lien had priority over the claims of the plaintiff's creditors. One of these creditors was the defendant in the plaintiff's suit who claimed to set off against the plaintiff's decree a decree on an award made in the defendant's favour in an earlier proceeding. The attorney did not state that there was no chance of his recovering his costs from his clients, and that there was no other property out of which his claim could be satisfied. It was held that in the circumstances of that case it would not be proper d for the Court to hold that the attorney's lien intercepted the set-off claimed. This case supports the view that the question of priority as between the attorney who sets up his lien, and a debtor of the client, who claims a set-off, is a matter of discretion. This view has been taken also in 34 Bom. L. R. 1429.⁷

None of the foregoing decisions are of real assistance to the opposite party in the present application, because in my judgment this case falls entirely outside the common law rule which governs what is known as the solicitor's particular lien, and which has been applied in these decisions. That rule is founded on the principle that the solicitor is entitled to have his costs out of the property obtained for his client by the solicitor's exertions. Quite other considerations apply when the property is part of a fund which has come into the solicitor's hands for a particular purpose. It has been held that where moneys in a solicitor's hands have been earmarked for a specific purpose, the solicitor's lien for costs cannot intervene to defeat it. In (1892) 1 Q. B. 314⁸ a judgment-debtor had deposited with his solicitors a sum of money to be applied to a special purpose. The judgment-debtor died and the purpose failed. The judgment-creditor sought to attach the sum in the hands of the solicitors. It was held, that since on the failure of the special purpose for which it was deposited with the solicitors, the money remained in their hands subject to a trust to repay it to the judgment-debtor, they could not set up their claim to costs in answer to a demand for the return of the money, and that therefore it was a debt due from them to the judgment-debtor which could be attached. Lord Esher M. R. observed that the money was placed in the hands of the solicitors for a particular purpose :

"So long as that purpose existed there was a trust imposed on them, and they were bound, if they accepted the money at all, to employ it or lay it out in the particular way indicated by the trust. That trust failed and the result of the failure was that another trust arose immediately to pay back the money to the person who gave it. It is admitted that being trustees no lien would attach in their favour, because the money was entrusted to them for a specific purpose."

In *re Clark, Ex parte Newland*,⁹ was a case in which certain creditors had resolved to accept a composition payable in two instalments. No trustee was appointed, but the debtor's solicitor paid the creditors the first instalment by means of money supplied to him by the debtor. A sum sufficient to provide for the second instalment was placed in the solicitor's hands, but he did not pay all the creditors. Upon an application for payment by an unpaid creditor, the solicitor claimed a lien on the moneys in his hands for costs due to him by the debtor. It was held that the

4. ('36) 63 Cal. 746 : 40 C. W. N. 458, *Hari Das Datta v. Kalu Ram*.

5. ('39) I. L. R. (1939) 1 Cal. 212 : 43 C. W. N. 290, *Ganesh Chunder v. Narayani Dassi*.

6. ('17) 4 A. I. R. 1917 Cal. 241 : 38 I. C. 30 : 43 Cal. 932 : 21 C. W. N. 106, *Bhupendra Nath v. E. D. Sassoon & Co.*

7. ('32) 19 A. I. R. 1932 Bom. 619 : 141 I. C. 406 : 34 Bom. L. R. 1429, *Vallabhdas Mulji v. Pranshankar*.

8. (1892) 1 Q. B. 314 : 61 L. J. Q. B. 463 : 66 L. T. 218 : 40 W. R. 101, *Stumore v. Campbell & Co.*

9. (1876) 4 Ch. D. 515 : 35 L. T. 916 : 25 W. R. 275.

a solicitor having constituted himself a trustee for the creditors was obliged to pay the creditor.

The same principle would seem to underlie two other decisions of which mention may be made: (1830) 1 Russ. & My. 361¹⁰ and (1880) 43 L. T. 533.¹¹ In the former case a solicitor had received rents due to an estate of which a receiver had been appointed. It was held that he would have to pay them over to the receiver and could not retain them on the ground of his lien, the Lord Chancellor observing that "a person can have no right of lien over property which he acquires in an assumed character." The latter case was one in which a wife had petitioned for divorce, and her solicitor had received from the husband a certain sum as alimony pendente lite. The solicitor's claim of a lien over the money for his costs was disallowed by the President of the Probate, Divorce and Admiralty Division in Chambers. On an appeal by the solicitor it was held, following (1879) 48 L. J. Mat. 61,¹² that alimony pendente lite paid over to the wife's solicitor, without a direct waiver of her right to have it applied as she required, was to be set apart for her maintenance only. During the argument the learned President observed as follows:

"So far as I have any control over it I will not allow any sums of money paid over by the husband as alimony for the distinct purpose of the wife's maintenance to be applied to any other purpose than that of her maintenance."

In my opinion the undertaking set out in the order of 31st August 1939, whereby the defendant agreed to deposit with his attorney monies to be held by the attorney, constituted a trust. It was contended by the learned Senior Standing Counsel, as already indicated that the money did not pass into the attorney's hands by reason of that order but was obtained for the defendant through the attorney's exertions in proceedings in connexion with the decree made in the defendant's favour in suit No. 1000 of 1938. I am not sure of that, but even were that so, it is the character of the attorney's possession when the sum of Rs. 1500 came into his hands which has to be looked at. The learned Senior Standing Counsel has argued that the attorney did not undertake to be a trustee in respect of this fund, and that the order did not make it subject to

any charge in favour of the plaintiff. That may be the case so far as express words go. But what was the intention of the words "to be held by Mr. Poddar?" What were the circumstances leading up to the undertaking and to the order in which it was embodied? There can be only one answer. The plaintiff had agreed to the discharge of the interim injunction, and to the adjournment of his application for attachment before judgment, on the distinct understanding that the defendant's attorney was to hold a certain sum to answer the claim of the plaintiff, should the latter be successful in his suit against the defendant. The plaintiff was obviously agreeing to such an arrangement in lieu of other security. The fund was to be, and was to remain until further orders, security for the plaintiff's claim. This was the only purpose for which the money was to be held. In my judgment the attorney had assumed the character of a stake-holder, and his possession was impressed with a trust. His lien for his costs cannot therefore prevail.

The application is allowed with costs against both the respondents. Certified for two counsel as of a motion. With regard to the Rs. 1500 held by Mr. Poddar, he is directed to pay the amount into Court by Friday next. If any money, being the difference between the sum of Rs. 3700 mentioned in the order of McNair J. of 31st August 1939, and the sum of Rs. 1500 herein mentioned, comes into the hands of the attorney, Mr. Poddar, in execution or otherwise, in satisfaction of the decree obtained by his client in suit No. 1000 of 1938, the attorney Mr. Poddar is directed to pay that money also into Court in pursuance of the order now made. Appeal, if any, is to be filed within a week of the receipt of the certified copy of the judgment. If the respondents do not file their appeal within that time, the petitioner will be at liberty to withdraw the money in Court.

G.N.

Application allowed.

* A. I. R. (31) 1944 Calcutta 193

FULL BENCH

NASIM ALI, R. C. MITTER AND AKRAM JJ.

Mritunjoy Mitra — Appellant

v.

Satish Chandra Banerjee — Respondent.

Full Bench Reference No. 1 of 1943, Decided on 17th February 1944, in F. A. No. 192 of 1941.

10. (1830) 1 Russ. & My. 361 : 32 R. R. 221, Wickens v. Townshend.

11. (1880) 43 L. T. 533, Cross v. Cross.

12. (1879) 48 L. J. Mat. 61: 40 L. T. 788: 27 W.R. 921, Leete v. Leete.

^a Bengal Money-lenders Act (10 of 1940), S. 36 (1) (a), Proviso (ii) and S. 2 (22) — Interpretation and effect of — Suit to recover money lent upon mortgage—Final decree executed by sale before 1st January 1939 — Personal decree for unrealised balance remaining unsatisfied on 1st January 1939 — All three decrees preliminary, final and personal can be re-opened under S. 36 : I. L. R. (1942) 2 Cal. 243=(‘42) 29 A. I. R. 1942 Cal. 379=202 I. C. 343 and 77 C. L. J. 373 = (‘43) 30 A.I.R. 1943 Cal. 372=209 I. C. 34, *OVER- RULED*.

Section 36 (1) (a), Proviso (ii) makes it clear that a decree can be re-opened if it is a decree in a suit to which the Act applies and if it was not fully satisfied before 1st January 1939. The effect of the proviso is that a decree passed in a suit to which the Act does not apply cannot be re-opened under the powers conferred by S. 36 (1) (a) and a decree passed in a suit to which the Act applies cannot be re-opened if it had been fully satisfied by 1st January 1939.

[P 196b]

The definition of the phrase “a suit to which the Act applies” in S. 2 (22) holds good for purposes of S. 36 (1) as there is nothing in S. 36 (1) which modifies that definition. Section 2 (22) makes it clear that a suit would be a suit to which the Act would apply if it was instituted after 1st January 1939 or pending on that date and although a suit for recovery of a loan had terminated before that date by the decree being passed it would still be a suit to which the Act would apply if a proceeding in connexion with that suit had been instituted after that date or was pending on that date if the scope of that proceeding was recovery of the loan.

[P 195e,f]

Consequently, where in a suit for the recovery of money lent upon a mortgage the final decree was executed by the sale of the mortgaged property before 1st January 1939 but a personal decree for the unrealised balance remained unsatisfied on that date, each of the three decrees the preliminary, final and personal decree must be regarded as a decree in a suit to which the Act applies and since the personal decree which was for the balance due under the final decree was not fully satisfied on 1st January 1939, the final decree also cannot be said to be fully satisfied on 1st January 1939 nor can the preliminary decree be said to have been fully satisfied when the amount due under the personal decree has not been paid and the final decree has not been fully satisfied, because the amount covered by the preliminary decree and the amount covered by the final decree are included in the amount which was declared to be due to the mortgagee under the preliminary decree and which the mortgagor was directed to pay to the mortgagee within the period of grace. Thus, none of those three decrees can be said to have been satisfied by 1st January 1939, and, therefore, all the three decrees, the preliminary, final and the personal decree can be re-opened under S. 36 so as to affect all the three : I. L. R. (1942) 2 Cal. 243=(‘42) 29 A. I. R. 1942 Cal. 379=202 I. C. 343 and 77 C. L. J. 373 = (‘43) 30 A.I.R. 1943 Cal. 372=209 I. C. 34, *OVER- RULED*; (‘42) 29 A. I. R. 1942 Cal. 568, *Approved*.

[P 195a,b,h; P 196d,e]

Dr. S. C. Basak, A. N. Bose, Anil Kr. Das Gupta and Sisir Kr. Basu — for Appellant.

S. N. Banerji, Dr. Naresh Ch. Sen Gupta, Chandra Sekhar Sen and Khitish Ch. Basu — for Respondent.

Order.—The defendant executed in favour

of the father of the plaintiff two mortgages in respect of the same property, on 17th July 1923 and 19th June 1925, for Rs. 5000 and Rs. 2000, respectively. Interest was payable at 15 per cent. per annum in respect of the first bond and at 18 per cent. per annum in respect of the second bond according to the stipulations in the bond. The mortgagee thereafter instituted a suit in the Court of the Subordinate Judge at Howrah in the year 1930 for recovery of Rs. 15,500 on the two mortgage bonds. The suit was decreed in full and a preliminary decree was passed on 24th February 1931, for a sum of Rs. 19,803-2-0 including interest pendente lite amounting to Rs. 3058-12-0 and costs of the suit amounting to Rs. 1244-6-0. The preliminary decree was made final on 30th March 1931. In execution of the final decree, the mortgaged properties were sold and were purchased by the mortgagee for Rs. 10,000 on 8th March 1932. Before the sale the mortgagor paid Rs. 5375 to the mortgagee towards part satisfaction of the decree. The sale was confirmed on 13th August 1932. The mortgagee obtained possession of the properties purchased by him on 11th September 1932, through Court. On 26th May 1934, the mortgagee applied for and obtained a personal decree under O. 34, R. 6, Civil P. C. On 27th March 1935, the mortgagee died leaving the plaintiff as his only heir. This personal decree was put into execution on 21st May 1937, in Execution Case No. 30 of 1937. On 15th June 1937, this execution case was dismissed for non-prosecution. The personal decree was again put into execution on 18th May 1940, in Execution Case No. 27 of 1940. This execution case was again dismissed for default on 11th June 1940. The Bengal Money-lenders Act (Bengal Act 10 of 1940, hereafter called the Act) came into force on 1st September 1940. On 19th November 1940, the defendant applied for review under S. 36 (6) (ii) of the Act. In this application he prayed for the reopening of the preliminary mortgage decree, the final mortgage decree and the personal decree and for certain other reliefs. The Subordinate Judge allowed this application on 30th June 1941 and passed a new preliminary decree under S. 34, Bengal Money-lenders Act. On 4th August 1941, plaintiff appealed to this Court. This appeal came up for hearing before a Division Bench of this Court.

The question before the Division Bench was whether the Subordinate Judge was right in reopening the preliminary mortgage decree, the final mortgage decree and the personal decree and in passing a new decree under S. 34, Bengal Money-lenders Act. In 46

C. W. N. 457¹ and in 47 C. W. N. 524² it was held that the preliminary decree and the final decree could not be re-opened under S. 36 of the Act, but the personal decree was liable to be re-opened. In 75 C. L. J. 299,³ it was held that all the three decrees can be re-opened under S. 36 of the Act. On account of this conflict of opinion the following question has been referred to a Full Bench :

"Where in a suit for the recovery of money lent upon a mortgage, the final decree was executed by the sale of the mortgaged property before 1st January 1939, but a personal decree for the unrealised balance remained unsatisfied on that date, can the Court in exercise of its powers under S. 36, Bengal Money-lenders Act, reopen the preliminary decree and final decree as well as the personal decree so as to affect all three ?"

The material provisions of S. 36 are these :

36. (1) "Notwithstanding anything contained in any law for the time being in force if in any suit to which this Act applies the Court has reason to believe that the exercise of one or more of the powers under this section will give relief to the borrower it shall exercise all or any of the following powers as it may consider appropriate, namely, shall : (a) re-open any transaction and take an account between the parties

Provided that in the exercise of these powers the Court shall not (ii) do anything which affects any decree of a Court other than a decree in a suit to which this Act applies which was not fully satisfied by the 1st day of January 1939.

(2) If in exercise of the powers conferred by sub-s. (1) the Court re-opens a decree, the Court (a) shall, after affording the parties an opportunity of being heard, pass a new decree in accordance with the provisions of this Act.

(6) Notwithstanding anything contained in any law for the time being in force : (a) the Court which in a suit to which this Act applies passed a decree which was not fully satisfied by the first day of January 1939, may exercise the powers conferred by sub-ss. (1) and (2) (ii) on an application for review of such decree made within one year of the date of the commencement of this Act

From the proviso to S. 36 (1) (a) it is clear that the preliminary and final mortgage decrees and the personal decree can be reopened if (1) they are decrees in a suit to which the Act applies and (2) if they were not fully satisfied by 1st January 1939. The first question for determination, therefore, is whether these three decrees are decrees in "a suit to which the Act applies." Unless there is something repugnant in the context or subject that phrase means

1. ('42) 29 A.I.R. 1942 Cal. 379 : 202 I. C. 343 : I.L.R. (1942) 2 Cal. 243 : 76 C. L. J. 41 : 46 C. W. N. 457, Naresh Chandra Gupta v. Lal Mamud Bhuiya.

2. ('43) 30 A.I.R. 1943 Cal. 372 : 209 I. C. 34 : 77 C. L. J. 373 : 47 C. W. N. 524, Bhabani Prosad Maitra v. Satyendra Nath Mukherjee.

3. ('42) 29 A.I.R. 1942 Cal. 568 : 203 I. C. 485 : 75 C. L. J. 299, Abdul Wahed Howladar v. Sukumari Debi.

"any suit or proceeding instituted or filed on or after the first day of January 1939, or pending on that date and includes a proceeding in execution (a) for recovery of a loan."

We quote only that portion of the definition as given in S. 2, cl. 22 of the Act, which is relevant for the case before us. Taking the words of S. 2, cl. 22 the following appear to us to be clear, namely : (a) a suit would be a suit to which the Act would apply if it was instituted after 1st January 1939 or pending on that date : (b) although a suit for recovery of a loan had terminated before that date by the decree being passed it would still be a suit to which the Act would apply if a proceeding in connexion with that suit had been instituted after that date or was pending on that date if the scope of that proceeding was recovery of the loan.

The learned advocate for the appellant, while admitting the correctness of the above conclusions, contends that on the definition as it stands the proceeding for execution must either be started after 1st September 1940, when the Act came into force, or must be pending on that date. We cannot accept that contention. On this construction that clause would read thus : "A suit to which this Act applies means any suit or proceeding (including a proceeding in execution) instituted or filed on or after 1st January 1939 or pending on that date for (a) recovery of a loan" As the proceedings in execution of the personal decree passed in the mortgage suit had been instituted in the case before us after 1st January 1939, the mortgage suit would be "a suit to which the Act applies" within the meaning of S. 36, sub-s. (1) of the Act, unless the context of that sub-section implies otherwise. The decision of the Federal Court in 48 C. W. N. F. R. 36⁴ is that there is nothing in sub-s. (1) of S. 36 which would modify the definition as given in S. 2, cl. 22. The relevant passage is at p. 40 of the report and is as follows :

"Among the relieving provisions the relevant clauses are sub-ss. (1) and (2) of S. 36. Sub-section (1) gives the Court power to reopen transactions 'in any suit to which the Act applies,' and by the definition clause this expression includes not only suits instituted after 1st day of January 1939 and suits pending on that day, but even suits already disposed of unless proceedings in execution of decrees passed therein had also been completed by that date (see also proviso (ii) to S. 36 (1))."

Each of the three decrees—the preliminary, final and personal decree—is therefore a decree in a suit to which the Act applies.

4. ('44) 31 A. I. R. 1944 F. C. 18: 48 C. W. N. F. R. 36 (F.C.), Bank of Commerce Ltd. v. Amulya Krishna Basu.

- a* The next question is as to the precise scope of proviso (ii) to S. 36 (1) (a) of the Act. The case where only one decree has been passed, or is required to be passed under the law of procedure, in a suit for recovery of money due on a loan (e. g. suit on a simple money bond) does not present any difficulty. That decree can be said to be fully satisfied only when the decretal amount or its equivalent is paid by the judgment-debtor in full or when it is realised from him in full and applied towards the decretal amount. In a mortgage suit the law of procedure requires in all cases two decrees—a preliminary decree
- b* and a final decree—and in a mortgage suit on a simple mortgage or on an English mortgage or on an anomalous mortgage which contains a covenant to pay a further decree—the personal decree—may have to be passed in some cases. The effect of the proviso is: (1) that a decree passed in a suit to which the Act does not apply cannot be reopened in exercise of the powers conferred by sub-s. (1), cl. (a) of S. 36, and (2) that a decree passed in a suit to which the Act applies cannot be re-opened, if it had been fully satisfied by 1st January 1939.

- A suit to which the Act applies must be
- c* “a suit to recover a loan.” A decree in such a suit must therefore mean “the amount decreed in such a suit.” A decree in a suit to which the Act applies is, therefore, fully satisfied only when the decretal amount or its equivalent has been received by the decree-holder either amicably or through Court. The personal decree in this case was not admittedly satisfied by 1st January 1939. Form No. 8 of Sch. D, Civil P. C., on terms of which the personal decree in this case has been drawn up, states that the amount for which the personal decree is being passed is for the balance due to the plaintiff under the
- d* final decree. The final decree thus was not satisfied by 1st January 1939, as the amount mentioned in the personal decree was neither paid in full nor realized in full by 1st January 1939. It was still due on 18th May 1940, when an application for execution of the personal decree was filed and is owing even now. The amount covered by the personal decree as well as the amount of the final decree are included in the amount which was declared to be due to the plaintiff under the preliminary decree and which the defendant was directed by the preliminary decree to pay to the plaintiff within the period of grace. As the amount due under the personal decree has not admittedly been paid and the final decree has not been fully satisfied, the preliminary

decree cannot be said to have been fully satisfied by 1st January 1939.

Our conclusions therefore are: (1) that each of the three decrees in the suit is a decree to which the Act applies, and (2) that none of those three decrees was fully satisfied by 1st January 1939. Our answer to the question referred to us is in the affirmative. All the three decrees can be reopened under the powers contained in S. 36, Bengal Money-lenders Act, so as to affect all the three. Parties are to bear their own costs in this reference.

G.N.

Answer accordingly.

A. I. R. (31) 1944 Calcutta 196
SPECIAL BENCH

NASIM ALI, R. C. MITTER AND
AKRAM JJ.

Bank of Commerce Ltd. Calcutta —
Plaintiff — Petitioner

v.

Kunja Behari Kar s/o Ishan Chandra
Kar and another — Defendants —
Opposite party.

Civil Rules Nos. 818 of 1941, 284, 451, 453 and 1348 of 1942; 438 and 814 of 1943, Decided on 24th February 1944, from judgment and order of Munsif Second Court (with Small Cause powers), Khulna.

(a) Bengal Money-lenders Act (10 of 1940), g
Ss. 29 (2) and 30 — Ss. 29 (2) and 30 prevail
over Ss. 79, 80 and 32, Negotiable Instruments
Act.

The expression “other like instruments” in Entry No. 28 of List 1 of Government of India Act means “instruments of the same genus as cheques, bills of exchange and promissory notes.” Negotiability is the common essential attribute of the instruments mentioned in the said entry. Legislation with respect to matters coming under Entry 28 of List 1 must mean “legislation with respect to the negotiable aspect of these instruments.” The other aspects of these instruments dealt with by the Negotiable Instruments Act, 1881, do not properly come within List 1. Interest on promissory notes therefore is a matter with respect to contract in the Concurrent Legislative List. The Bengal Money-lenders’ Act having received the assent of the Governor-General, S. 29 (2) and S. 30, Bengal Money-lenders Act, 1940, prevail over Ss. 79, 80 and 32, Negotiable Instruments Act, by virtue of S. 107 (2), Government of India Act. [P 198c,d,e]

(b) Bengal Money-lenders Act (10 of 1940),
Ss. 29 (2) and 30 — Holder in due course —
Whether rights of, are affected (*Quære*).

Whether Ss. 29 (2) and 30 of the Act affect the
rights of holders of promissory notes in due course.
[P 198e]

S. M. Bose (Advocate-General) and Kalyan Bose
— for Province of Bengal.

Dr. Naresh Chandra Sen Gupta and Sris
Chandra Dutta — for Petitioner.

Satindra Nath Roy Choudhury and Sovendra
Madhab Basu (in 818); Manindra Nath
Ghose and Hemanta Krishna Mitra (in 284);
Manindra Nath Ghose (in 451); Manindra
Nath Ghose and Shibdas Ghose (in 453); and
Satyendra Nath Mitra (in 438) (for Deputy
Registrar) — for Opposite Party.

ORDER

Civil Revision No. 818 of 1941. — The opposite parties jointly borrowed a sum of Rs. 150 from the K. L. Bank Ltd., (formerly known as the Khulna Loan Co. Ltd.) on 3rd January 1920, on a promissory note with a promise to pay on demand to the said Bank the sum borrowed with interest at the rate of Re. 1-6-0 per cent. per annum. The opposite parties paid Rs. 415-11-0 as interest on the said loan. The last payment of interest was made on 11th March 1938. In the year 1940 the Bank instituted a suit against the opposite parties for recovery of Rs. 150 as principal sum of the loan together with Rs. 99-13-0 as balance of interest due in the Small Cause Suit No. 495 of 1940 of the second Court of the Munsif at Khulna. The defence of the opposite parties in the suit was that they had already paid a sum of Rs. 415-11-0 and so the bank was not entitled to get any decree against them in view of the provisions of S. 30, Bengal Money-lenders' Act, 1940. On 5th April 1941, the Small Cause Court Judge held that as more than double the principal sum had already been realised the plaintiff bank could not realise any other sum from the opposite parties. He accordingly dismissed the suit. By an order of this Court under S. 153 (a), Companies Act, dated 12th May 1941, the entire undertakings, assets and liabilities of the bank were transferred to the petitioner bank. On 23rd June 1941, the petitioner bank obtained a rule from this Court under S. 25, Provincial Small Cause Courts Act, upon the opposite parties to show cause why the order of the Small Cause Court Judge dated 5th April 1941 dismissing the Small Cause suit should not be set aside.

The material provisions relating to interest on loans advanced on the basis of promissory notes are contained in Ss. 32 and 79, Negotiable Instruments Act, 1881, S. 3, Usurious Loans Act, and Ss. 3 to 6, Bengal Money-lenders Act, 1933. All these Acts were passed before the commencement of Part 3, Government of India Act, 1935. These provisions, therefore, constitute the existing Indian law relating to promissory notes as defined by S. 311 (2), Constitution Act. The Bengal Money-lenders Act, 1940 (hereinafter referred to as the Bengal Act) was passed by the Bengal Legislature after the commencement of Part 3, Government of India Act, 1935. This Act by excluding promissory notes from Exception (e) to the definition of loan has shown a deliberate intention to deal with interest on promissory notes. 'Promissory note' comes within the exclusive field of the

Federal Legislature (Entry No. 28 of List 1), while 'money-lending and money-lenders' is within the exclusive competence of the Provincial Legislature (Entry No. 27 of List 2). In (1943) 6 F.L.J.F.C. 221,¹ it was held by the Federal Court that the Bengal Act must, taken as a whole, be held to fall within the description 'legislation in respect of money-lending and money-lenders' and is not wholly void as ultra vires of the provincial Legislature.

Section 30, Bengal Act, is repugnant to Ss. 79 and 80, Negotiable Instruments Act, 1881, S. 29 (2), Bengal Act, is repugnant to S. 32 read with S. 79, Negotiable Instruments Act. Now the question is how this conflict is to be resolved. The contention of the Advocate-General is that this conflict should be resolved by applying cl. 2 of S. 107, Government of India Act, 1935 and that it should be held that provincial law (Ss. 29 (2) and 30, Bengal Act) should prevail. The contention of Dr. Sen Gupta is that this conflict should be resolved not by the application of S. 107 (2), Government of India Act, 1935, but by an extension of the principle of S. 107 by analogy or by the application of the Canadian doctrine of the occupied field as suggested by Sulaiman J. in *Subrahmanyam Chettiar's case*.² In (1943) 6 F.L.J.F.C. 221¹ referred to above the Federal Court has observed :

"Where the problem can only be one of conflict between the provisions of the local law and the provisions of a central enactment, each being intra vires the particular legislature, it is unnecessary to invoke the rule of severability to uphold the validity of the impugned Act. Language has sometimes been employed in enunciating the doctrine of 'occupied field' which may seem to suggest that in respect of a field occupied by central legislation, the provincial legislature would have no power at all to deal with the subject. But having considered all the decisions bearing on that question, in our judgment it is the doctrine of repugnancy and not the doctrine of ultra vires that has to be applied in this class of cases."

The material provisions of S. 107, Government of India Act, 1935, are these :

107. (1)—"If any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature is competent to enact or to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then subject to the provisions of this section, the Federal law, whether passed before or after the Provincial law, or, as the case may be, the existing Indian law, shall prevail and the Provincial law shall, to the extent of the repugnancy, be void."

107. (2)—"Where a Provincial law with respect to one of the matters enumerated in the Concurrent

1. ('44) 31 A.I.R. 1944 F. C. 18 : (1943) 6 F. L. J. F. C. 221 (F. C.), Bank of Commerce Ltd. v. Amulya Krishna Basu Roy.

2. ('41) 28 A.I.R. 1941 F.C. 47 : 192 I.C. 225:1940 F. C. R. 188 : I. L. R. (1941) Kar. F.C. 25 (F. C.), Subramanyam Chettiar v. Muthuswami Goundan.

a Legislative List contains any provision repugnant to the provisions of an earlier Federal law or an existing Indian law with respect to that matter, then, if the Provincial law, having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure, has received the assent of the Governor-General or of His Majesty, the Provincial law shall in that Province prevail but nevertheless the Federal Legislature may at any time enact further legislation with respect to the same matter."

* * * *

b Clause 2 of S. 107 contemplates a conflict between a provincial law with respect to one of the matters enumerated in the Concurrent Legislative List and the provisions of "an existing Indian law" as defined by S. 311 (2), Government of India Act, 1935, with respect to that matter. In *Subrahmanyam Chettiar's case*² Gwyer C. J. observed:

c "I doubt whether any provincial Act could, in the form of a debtors' relief Act, fundamentally affect the principle of negotiability or the rights of a bona fide transferee for value. Perhaps the position is different where the promissory note has never changed hands and is sued upon by the original payee; and it may be (though I do not decide the question) that an Act such as the Court is now considering can operate upon the original debt in such cases, even though the creditor has taken a promissory note in respect of his debt. If it were otherwise, the power of Provincial Legislatures to enact remedial legislation in a field peculiarly their own would be very greatly hampered; so much so, indeed, that the Central Legislature might well find itself compelled to review the situation. But it would perhaps be inadvisable that I should say more on this occasion."

a The Negotiable Instruments Act, 1881, deals with negotiability, incidence of contract and its breach, and rules of evidence relating to negotiable instruments. The expression "other like instruments" in Entry No. 28 of List I means "instruments of the same genus as cheques, bills of exchange and promissory notes." Negotiability is the common essential attribute of the instruments mentioned in the said entry. Legislation with respect to matters coming under Entry No. 28 of List I must, therefore, mean "legislation with respect to the negotiable aspect of these instruments." The other aspects of these instruments dealt with by the Negotiable Instruments Act, 1881, do not, therefore, properly come within List I. Contract and the rules of evidence come under the Concurrent Legislative List. Interest is payable (a) where there is a contract and (b) where there is no contract as damages for breach of contract. (1819) 106 E. R. 378.³ Interest on promissory notes, therefore, is a matter with respect to contract in the Concurrent Legislative List. The

Bengal Act has received the assent of the Governor-General. In view of the provisions of S. 107 (2), Constitution Act, Ss. 29 (2) and 30, Bengal Money-lenders Act, 1940, must prevail.

The petitioner bank is not the holder of the promissory note in due course. We therefore express no opinion on the question as to whether Ss. 29 (2) and 30, Bengal Act, affect the rights of holders of promissory notes in due course. The Subordinate Judge was therefore right in dismissing the suit of the petitioner bank. The rule is accordingly discharged. The parties will bear their own costs in this rule.

Civil Revision Cases Nos. 284 of 1942, 451 of 1942, 453 of 1942, 1348 of 1942, 438 of 1943 and 814 of 1943.—In view of our decision in Civil Revision Case No. 818 of 1941, the other rules are all discharged without costs. We hereby certify that these cases involve a substantial question of law as to the interpretation of the Government of India Act, 1935.

R.K.

Rules discharged.

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SPECIAL BENCH

DERBYSHIRE C. J., PANCKRIDGE AND GENTLE JJ.

In the Goods of Nanibala Debi — Deceased.

Ordhendra Coomar Gangoly — Appellant
v.

Hrishikesh Chatterjee — Respondent.

Appeal No. 61 of 1939, Decided on 24th April 1942, from original order in Test Suit No. 5 of 1938.

Solicitor—Costs—In-pocket costs—Question as to agreement should be decided by suit and not by summary proceeding.

The question whether there was an agreement between the attorney and the client to charge in-pocket costs must be determined, if the attorney so desires it, by a suit brought by him and not by a summary proceeding. [P 199c]

S. P. Chaudhuri — for Appellant.

E. Meyer — for Respondent.

Derbyshire C. J.—This appeal has occupied a great deal of time and we are indebted to learned counsel for the appellant, Mr. Chatterjee and also to learned counsel for the respondent, Mr. Meyer who has appeared and represented the interests of the respondent as *amicus curiae*.

After considering the matter very carefully, we are of the opinion that subject to one addition the order of the learned Judge must be upheld. That addition arises out of the decision of the learned Judge that there was an agreement between the client and the at-

a torney that the attorney should not charge the client for in-pocket costs. The matter was dealt with summarily by the learned Judge and except as regards the determination of the right to in-pocket costs the procedure was the proper one. As regards in-pocket costs the client alleged that there was an agreement between himself and the attorney that the attorney should not charge the in-pocket costs and the learned Judge has accepted that allegation as being correct. Normally the attorney would be entitled to charge his in-pocket costs and he would be entitled to sue for them on the basis of remuneration for the work he had done for the client.

It seems to me that the question of whether there was a contract of the nature the client alleges and the attorney denies was not a suitable subject-matter for determination in a summary proceeding of this kind. The proceeding began on 13th July as the result of an informal petition laid before the Judge which the attorney did not see and the matter was finally determined a month later on 14th August. It has therefore been determined without the attorney having the benefit of the usual incidents of a trial according to the ordinary procedure of this Court. The summary procedure in my view was not intended to apply to a matter of this latter kind and I am of the opinion that the question whether there was an agreement between the attorney and the client to charge in-pocket costs must be determined, if the attorney so desires it, by a suit brought by him.

The order as made by Ameer Ali J. will therefore stand with this addition. The said attorney being at liberty to sue for his taxed in-pocket costs in a separate suit, the said sum of Rs. 1000 will remain in the hands of the surety for three months after which time either party will be at liberty to apply to this Bench for directions as to the disposal of the same. The exceptions to the attorney's bill will be heard and disposed of within ten days from this date by the Registrar of this Court. In the event of the attorney appealing to the Judge from the decision of the Registrar in the matter of exceptions, such appeal will be heard and disposed of within one month of the filing of the same. There will be no order as to costs in this appeal.

Panckridge J. — I agree.

Gentle J. — I agree.

R.K.

Order accordingly.

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B. K. MUKHERJEA AND PAL JJ.

Phani Bhusan Mukherjee — Receiver
— Appellant

v.

Purna Chandra Bagchi and others — Respondents.

Appeal No. 29 of 1942, Decided on 4th June 1943, from appellate order of Dist. Judge, Burdwan, D/- 17th September 1941.

(a) Bengal Tenancy Act (8 of 1885), S. 168A (1) (b)—Dominant intention is to absolve judgment-debtor from all further liability.

The dominant intention underlying the section seems to be to absolve the judgment-debtor from any further liability when the entire tenure or holding is put up to sale. [P 201a]

(b) Bengal Tenancy Act (8 of 1885), S. 168A —“Purchaser”—Decree-holder purchaser is not excluded.

Having regard to the clear language of S. 168A it is not possible to say that the word “purchaser” occurring in cl. (b) of sub-s. (1) and in sub-s. (3) excludes the decree-holder purchaser. [P 200h; P 201b]

(c) Bengal Tenancy Act (8 of 1885), S. 168A (3) — Cash deposit is not always necessary — Decree-holder himself purchaser — Court can certify his acknowledgment that nothing is due and confirm sale.

A cash deposit is not always necessary in sub-s. (3) of S. 168A. Under cl. (b) of sub-s. (1), the purchaser has got to pay amongst others the rent which may have become payable to the purchaser between the date of the institution of the suit and the date of the confirmation of the sale. If the decree-holder who is himself the purchaser certifies to the Court that nothing is due or payable to him on that account, the Court can certainly record that acknowledgment and confirm the sale without requiring any cash deposit: 61 C. L. J. 313, *Rel. on.* [P 201d]

Hemendra Chandra Sen and Kshitish Ch. Ghatak — for Appellant.

Gopendra Nath Das and Kumud Bandhu Bagchi — for Respondents.

B. K. Mukherjea J. — The facts giving rise to this appeal may be shortly stated as follows. The appellant obtained a decree for rent against the respondents in respect of a darputni held by the latter under him in Rent Suit No. 5 of 1938 of the Court of the Subordinate Judge at Burdwan. The decree was put into execution in Rent Execution Case No. 157 of 1940 of that Court and the entire tenure in arrears was put up to sale on 4th June 1941 and purchased by the decree-holder himself for a sum which just covered the decretal dues and costs. The result was that the decree was satisfied in full by the sale of the darputni tenure. On 7th July 1941 which was the date fixed by the Court for confirmation of the sale, the purchaser presented an application to the Court stating that as he was himself the decree-holder, it was not necessary for him to deposit the arrears of rent

a payable in respect of the tenure between the date of the institution of the suit and that of the confirmation of the sale as required by sub-s. (3) of S. 168A, Bengal Tenancy Act, and that the sale might be confirmed without any such deposit. It was stated in the said application that the decree-holder had already instituted a suit against the judgment-debtors claiming rents for the subsequent period. The application was resisted by the judgment-debtors who contended *inter alia* that the decree-holder purchaser should either make a deposit as is required by sub-s. (3) of S. 168A, Ben. Ten. Act, or he should put in an application certifying payment of the arrears of rent for the period mentioned above.

The trial Court accepted the contention of the decree-holder and held that sub-s. (1), cl. (b) as well as sub-s. (3) of S. 168A, Ben. Ten. Act, were applicable only when the auction purchaser of the tenure or holding was a third party and not the decree-holder himself, and consequently the decree-holder purchaser was not required to make a deposit prior to the sale being confirmed.

c On appeal, the judgment was reversed by the District Judge, Burdwan and it was held by the learned District Judge that regard being had to the plain language of the provisions, it could not be said that the word 'purchaser' in cl. (b) of sub-s. (1) as well as in sub-s. (3) of S. 168A, Ben. Ten. Act, was restricted to a third party purchaser only. It is the propriety of this view that is being challenged before us in this appeal.

d Now, the provisions of cl. (b) of sub-s. (1) of S. 168A, Ben. Ten. Act, are perfectly general. It lays down that when a tenure or holding is sold in execution of a rent decree, the purchaser shall be liable to pay to the decree-holder the deficiency, if any, between the purchase price and the amount due under the decree together with the costs of bringing the tenure or holding to sale and the rent accrued since the institution of the suit and up to the date of the confirmation of the sale. The word 'purchaser' occurs in several places in Chapter 14, Ben. Ten. Act, and it is nowhere used in the restricted sense of meaning a third party purchaser only and excluding the decree-holder purchaser. It is true, as Mr. Sen points out, that in cl. (b) of sub-s. (1) of S. 168A, Ben. Ten. Act, the liability has been imposed upon the purchaser to make certain payments to the decree-holder, and ordinarily when the obligor and the obligee are one and the same person, the obligation is deemed to be extinguished. But here the purchaser is compelled to

discharge an obligation which would otherwise lie on the tenant judgment-debtor. Section 169, Ben. Ten. Act, lays down the rules relating to the distribution of sale proceeds when a tenure or holding is sold under Chap. 14, Ben. Ten. Act. The costs of bringing the tenure or holding to sale have got to be paid first; next the decretal dues are to be satisfied; and after this the decree-holder is entitled to be paid out of the surplus sale proceeds, if any, the rent which might have become due in respect of the tenure or holding between the date of the institution of the suit and the date of the confirmation of the sale. This is altered by S. 168A (1) (b), Ben. Ten. Act, and items 1 and 3 referred to above which were payable out of the sale proceeds, that is to say, the judgment-debtor's money, have now to be paid by the auction purchaser.

I cannot say that the object of the Legislature in enacting cl. (b) of sub-s. (1) of S. 168A, Ben. Ten. Act, was merely to benefit the decree-holder. It was, in my opinion, for the benefit of the judgment-debtor as well. It seems to me that the intention of the Legislature was, in the first place, to exonerate the tenant from all further liabilities when the entire tenure or holding was sold in execution of a rent decree. But as in that case, the decree-holder might suffer loss when the sale proceeds of the tenure or holding did not cover the entire decretal dues and the rent that accrued subsequent to the date of the suit, the liability for this payment was thrown upon the purchaser who could not otherwise be made liable for any claim that accrued prior to the date of his purchase.

It may have been in the mind of the Legislature that when a tenure or holding is sold in execution of a rent decree, it should at least fetch a price that will cover the decretal dues and the subsequent rents due to the landlord prior to the date of the confirmation of the sale. If the sale proceeds are insufficient to meet these demands, it is for the purchaser to make good this deficiency. I cannot hold that the Legislature intended to apply this rule only when the purchaser was a third party purchaser and not the decree-holder himself.

It may be that the wording of the section is not very happy and an argument may be founded on the fact that cl. (b) of sub-s. (1) of S. 168A, Ben. Ten. Act, while it imposes certain liabilities upon the purchaser has not expressly taken away the liability of the judgment-debtor in respect of the same. The language is undoubtedly not clear, but the

a dominant intention underlying the section seems to be to absolve the judgment-debtor from any further liability when the entire tenure or holding is put up to sale.

Assuming, however, for argument's sake that Mr. Sen's contention is right, and although the purchaser has been made liable to pay certain claims, as the obligation of the judgment-debtor has not been expressly taken away in respect of the same that liability still remains. Even then I think that sub-s. (3) of S. 168A would provide an adequate protection to the judgment-debtor. Under that sub-section, the Court is not competent to confirm the sale unless the purchaser deposits the amount specified in S. 168A (1), cl. (b), Ben. Ten. Act. Even if both the auction purchaser and the judgment-debtor are liable to meet these demands which are specified in the clause, as the amounts are compulsorily payable by the purchaser if he wants to have the sale confirmed, the moment the deposit is made, the liability of the judgment-debtor would be at an end. I think, therefore, that having regard to the clear language of S. 168A, Ben. Ten. Act, it is not possible to say that the word 'purchaser' occurring in cl. (b) of sub-s. (1) and in sub-s. (3) excludes the decree-holder purchaser.

c It is next argued that it is unthinkable that the Legislature would provide for deposit by the decree-holder purchaser when he himself has got to withdraw the deposit soon after it is made. I may say that there is nothing per se unreasonable in requiring the decree-holder to make a deposit as is contemplated by sub-s. (3). Under the law as it stood prior to the introduction of S. 168A in the Ben. Ten. Act, when the landlord decree-holder himself purchased the tenure or holding at a rent sale, he might have to pay the entire amount of purchase money into Court, although he would be entitled to be paid out of it not only the decretal dues and the costs of execution, but the subsequent rents that accrued due after the date of the suit. I think, however, that a cash deposit is not always necessary in sub-s. (3) of S. 168A, Ben. Ten. Act. Under cl. (b) of sub-s. (1), the purchaser has got to pay amongst others the rent which may have become payable to the purchaser between the date of the institution of the suit and the date of the confirmation of the sale. If the decree-holder who is himself the purchaser certifies to the Court that nothing is due or payable to him on that account, the Court can certainly record that acknowledgment and confirm the sale without requiring any cash deposit. A similar view, it seems, was taken

by this Court in 39 C. W. N. 829¹ which was a case under O. 21, R. 89, Civil P. C., and where also the deposit is directed to be made in Court.

In the case before us, it appears that the decree-holder has got a decree already for rents for the period subsequent to the date of the suit up to the end of Chait 1347 B. S. which corresponds to the middle of April 1941. The application for confirmation of sale was made later in August 1941. We do not know what is the exact amount due under the decree. It would certainly be open to the decree-holder if he so chooses to certify in accordance with the provisions of law that the decree obtained by him has been satisfied to the extent of the amount that is necessary for him to deposit under sub-s. (3) of S. 168A, Ben. Ten. Act, and the Court on being satisfied that this has been duly and properly done can confirm the sale without requiring any cash deposit. The result, therefore, is that this appeal fails and is dismissed. There will be no order as to costs in this Court. No order is necessary on application under S. 115, Civil P. C.

Pal J. — I agree. The questions raised in this appeal are: (1) Whether the word 'purchaser' as used in S. 168A (1) (b), Ben. Ten. Act, includes the decree-holder auction purchaser; (2) if so, whether sub-s. (3) of S. 168A makes it imperative even for such a purchaser to deposit the sum referred to there.

Section 168A (1) (b) runs thus:

"the purchaser at a sale referred to in cl. (a) shall be liable to pay to the decree-holder the deficiency, if any, between the purchase price and the amount due under the decree together with the costs incurred in bringing the tenure or holding to sale and any rent which may have become payable to the decree-holder between the date of the institution of the suit and the date of the confirmation of the sale."

Section 168A (3) says:

"A sale referred to in cl. (a) of sub-s. (1) shall not be confirmed until the purchaser has deposited with the Court the sum referred to in cl. (b) of that sub-section."

The sale referred to in cl. (a) of sub-s. (1) is the sale of the entire tenure or holding in execution of a decree for arrears of rent due in respect of the tenure or holding, whether such decree has the effect of a rent decree or money decree. The sale in question may thus be either one held under Chap. 14, Ben. Ten. Act or one held under the provisions of the Code of Civil Procedure. There is no dispute that in either case a decree-holder himself may possibly bid for or purchase the tenure or holding at the sale. Section 173 (1), Ben.

1. ('35) 61 C. L. J. 313 : 39 C. W. N. 829, Jotish Chandra Ghosh v. Bireswar Haldar.

a Ten. Act, entitles him to do so without permission when the property is sold under Chap. 14 of the Act. Rule 72 (1) of O. 21, Civil P. C., only requires him to take permission of the Court.

The word 'purchaser' thus *prima facie* includes a decree-holder purchaser also. The word is used in Rr. 71, 84, 85, 86, 89, 91, 93, 94, 97 and 100 of O. 21, Civil P. C., and in Ss. 159, 164 (2), 165 (2), 166 (2), 167 (1), 174 (1) (b), and 174A(3), Ben. Ten. Act. Except the right of set-off given to a decree-holder purchaser by R. 72(2) of O. 21, Civil P. C., a decree-holder purchaser as such stands on the same footing as b any other purchaser and the word 'purchaser' is used everywhere to include a decree-holder purchaser. I do not see why the word should be taken to have been used in any narrower sense in S. 168A (1) (b) of the same Act. In its ordinary meaning it includes every person purchasing the property irrespective of the question whether he is or is not a party to the proceeding in any other capacity, and in this sense the word has always been used by the Legislature in all the relevant provisions referred to above.

c Mr. Sen, appearing for the appellant, contends that as the section speaks of liability of the purchaser to pay to the decree-holder, the purchaser and the decree-holder must be taken to refer to two distinct persons, and consequently the word 'purchaser' as used in this section must be taken to mean a purchaser other than the decree-holder.

Concepts which at first appear very clear and definite so as to make us forget all possible difficulties in employing them may turn out to be quite vague when used in a particular context. We may feel compelled to delimitate a concept more closely in such a case.

a It is certainly a well-established rule of grammar that the meaning of words depends largely, if not wholly, upon their collocation. But the collocation of the words 'purchaser' and 'decree-holder' here in relation to the liability dealt with in the sub-section does not, in my opinion, limit the ordinary meaning of the word 'purchaser.' Had it only been a question of creating a new liability and imposing on the purchaser this new liability to pay to the decree-holder then the decree-holder himself as purchaser might not have come within the term 'purchaser,' not because he was not a 'purchaser' but because the clause, according to the assumption made, would only have related to a liability to pay to the decree-holder and a liability of a person to himself does not exist.

But the Legislature here is really dealing with an already existing liability of the outgoing tenant and imposing this liability on the purchaser. As I read this cl. (b) with sub-s. (3) of S. 168A, the liability is intended to be shifted on from the outgoing tenant to the purchaser, the outgoing tenant being discharged of the liability altogether. Clause (b) as expressed, might not have produced that effect standing by itself. This clause standing alone might have been construed as having only made the purchaser severally liable for the same thing for which the outgoing tenant is already liable. Perhaps that is why sub-s. (3) was enacted so that the liability might be fully discharged by payment. When the statute is thus dealing with an otherwise existing liability of one person to pay to the decree-holder and is imposing this liability on the purchaser with a view to discharge the liability of that other person, the principle that a liability cannot exist on a claim at the same time by and against a person himself would not affect the construction of the word 'purchaser.' There is nothing wrong or absurd in shifting an existing obligation on to the obligee himself or even in imposing a several liability on the obligee himself on the happening of a certain contingency, though g the legal effect of this may be the extinction or discharge of the obligation itself. The meaning of the word 'purchaser' is otherwise clear and unequivocal and the word is ordinarily capable of only one meaning, namely, one who purchases. No absurdity or mischief follows from taking the word in its ordinary meaning. I do not therefore feel compelled to delimitate the concept in the manner suggested by Mr. Sen.

On the other hand, its delimitation will lead to unreasonable consequences. A decree-holder purchaser purchases the property in open competition with the stranger bidders. h Now, that there is this liability of the purchaser imposed by cl. (b) of S. 168A (1), Ben. Ten. Act, the bid given by a stranger bidder may be presumed to be the price of the holding minus the sum referred to in cl. (b) above. If a decree-holder purchaser have not to face the liability dealt with in cl. (b) he will always be in a position to outbid a stranger bidder and yet purchase the property at an inadequate price to the detriment of the outgoing tenant. I do not see any reason why the section should be construed thus to place the decree-holder in a position to compete at the bidding unfairly with the stranger bidders to the detriment of the judgment-debtor tenant. The ratio of

a the new provision is rather some special protection of this judgment-debtor tenant.

Further cl. (b) of S. 168A (1) read with S. 169 of the Act seems to set a minimum limit to the price of the holding or the tenure. The effect of cl. (b) of S. 168A (1) will be that the price to be paid by the purchaser for the holding or the tenure must cover up at least the items specified in cls. (a), (b) and (c) of S. 169 (1), Ben. Ten. Act. In the result, when the entire tenure or holding is thus sold in execution the outgoing tenant is to be relieved of the liability in respect of these items. It is clear that at b least in case of a stranger purchaser this is the intention of the Legislature. No reason could be suggested why this relief should be denied to the judgment-debtor when the decree-holder happens to be the purchaser.

It is not disputed that subject to the set-off allowed by R. 72 (2) of O. 21, Civil P. C., a decree-holder purchaser, like all other purchasers, is bound to deposit the purchase money under Rules 84 and 85 of O. 21, Civil P. C., though under the rules for disposal of the sale proceeds given in Ss. 169 (1) and 148A (8) (i), Ben. Ten. Act, the decree-holder purchaser himself may be entitled to a portion of the amount deposited. Rule 72 (2) of c O. 21, Civil P. C., allows set-off only in respect of the amount due on the decree. The amount of costs incurred in bringing the tenure or holding to sale and the amount of rent which may have become payable to the decree-holder between the date of the institution of the suit and the date of the confirmation of the sale, though payable to the decree-holder purchaser himself under cls. (a) and (c) of S. 169 (1), Ben. Ten. Act, will not be set-off against the purchase money to be deposited.

Remembering this, I do not see why the d word 'purchaser' in sub-s. (3) of S. 168A, Ben. Ten. Act, should not also be taken in its ordinary sense to include the decree-holder purchaser as well. Sub-section (3) requires that "the sum referred to in cl. (b) of sub-s. (1)" must be deposited with the Court. The sum referred to in clause (b) comprises three different items, namely, (1) the deficiency, if any, between the purchase price and the amount due under the decree; (2) the costs incurred in bringing the tenure or holding to sale; (3) any rent which may have become payable to the decree-holder between the date of the institution of the suit and the date of the confirmation of the sale. In naming these items the Legislature obviously kept in view the items in cls. (a), (b) and (c) of S. 169(1), Ben.

Ten. Act, and perhaps lost sight of the case contemplated by S. 148A (8) (i) (c) of the Act.

Under S. 169 the amount under item 3 named above was open to be determined by the executing Court : *vide* sub-s. (2) of S. 169, Ben. Ten. Act. Though S. 168A does not contain any provision corresponding to sub-s. (2) of S. 169, it is reasonable to hold that the Court holding the sale shall have power to determine the amount payable under this head. As the purchaser is now interested in its determination, he being made liable to pay the amount, the determination may be at his instance.

Clause (b) of S. 168A (1) speaks of "any f rent which may have become payable to the decree-holder" When the decree-holder himself is the purchaser, it may be that as no one can be debtor to himself, nothing remains payable to the decree-holder by the purchaser in such a case on this count and, if the decree-holder purchaser so requires, the Court may determine that nothing is payable to him on this count. On such a determination the decree-holder purchaser may not have to deposit anything on this count because nothing is payable therefor.

Neither party urged before us that by reason of the decree-holder himself being the purchaser and thus being made liable by g cl. (b) of S. 168A (1) to himself to pay the sum, the obligation itself is discharged by the operation of any principle of law consequently when the decree-holder himself becomes the purchaser nothing remains payable in respect of the above items and therefore nothing need be deposited by him under sub-s. (3). We do not pronounce any opinion on this. It, however, seems obvious that if this be the contention of the decree-holder purchaser, the judgment-debtor will have no possible objection to it. He is discharged of the liability all the same and that is all that h he is concerned with.

R.K.

Appeal dismissed.

A. I. R. (31) 1944 Calcutta 203

ROXBURGH AND BLANK JJ.

*Sm. Swarnamonjuri Dassi, Executrix
to estate of Babu Broja Lal Seal —
Decree-holder — Appellant*

v.

*Fakir Chandra Karar and others —
Judgment-debtors — Respondents.*

Appeal No. 290 of 1941, Decided on 13th July 1943, from appellate order of Dist. Judge, Howrah, D/- 14th November 1941.

(a) Bengal Tenancy Act (8 of 1885, as amended by Act 18 of 1940), S. 168A (1) (a) Proviso

- a — Rent decree — Defaulting tenure sold and purchased by decree-holder in 1938.—Portion of decretal amount realised — Execution for balance sought against other properties — Section 168A held barred proceedings.

The decree sought to be executed was in respect of arrears of rent due on a patni tenure, passed in January 1938. The decree-holder realised in 1938 a portion of his dues by sale of the defaulting tenure, and was himself the auction purchaser. He applied in 1941 for execution in respect of the balance of his dues by attachment and sale of other properties of the judgment-debtors, who claimed that S. 168A of the Act which came into force in January 1941, was a bar to the proceedings :

- b *Held* that the proviso to S. 168A (1) (a) did not apply and the execution against other properties of the judgment-debtors was barred: ('44) 31 A. I. R. 1944 Cal. 199, *Rel. on.* [P 204e; P 205c,d]

(b) Bengal Tenancy Act (8 of 1885, as amended by Act 18 of 1940), S. 168A (1) (a) Proviso —Extinction of tenancy by merger comes within proviso.

"Merger" of the tenancy in the superior interest of the landlord is one of the methods by which the term of a tenancy might expire within the meaning of the proviso to S. 168A (1) (a): ('42) 29 A. I. R. 1942 Cal. 478 and ('42) 29 A. I. R. 1942 Cal. 429, *Rel. on.* [P 204f,g]

- c (c) Bengal Tenancy Act (8 of 1885, as amended by Act 18 of 1940), S. 168A (1) (a) Proviso —Interpretation of — Words "expires" and "an application" in proviso—Meaning (*Per Roxburgh J.*).

The word "expires" in the proviso to S. 168A (1) (a) refers to expiry after the commencement of the amending Act of 1940, and the words "an application" in that proviso refer to the particular application which is otherwise barred under sub-s. (1) (a), but for the operation of the proviso. The proviso as a whole is to be taken as permitting the landlord to proceed against other property of the judgment-debtor if he can show that the tenancy has expired after the commencement of the amending Act and before the application made to proceed against such property : ('42) 29 A.I.R. 1942 Cal. 478, *Discussed.* [P 206b,c]

Hemendra Ch. Sen and Suresh Chandra Sen — for Appellant.

Bankim Ch. Dutt — for Respondents.

- d *Bireswar Chatterji* — for Deputy Registrar.

Roxburgh J. — This is an appeal against a decree of the District Judge of Howrah allowing an appeal against an order passed in proceedings under S. 47, Civil P. C., by the Subordinate Judge of the First Court, Howrah, dismissing the objection of judgment-debtors 3 and 4 before him made under the provisions of S. 168A, Ben. Ten. Act, to the effect that the landlord decree-holder could not proceed by attachment and sale against any property other than the tenure in arrear. The decree sought to be executed was a decree in respect of arrears of rent due on a patni tenure, passed in January 1938. The decree-holder realised in 1938 a portion of his dues by sale of the defaulting tenure, and was himself the

auction purchaser. He has applied in 1941 for execution in respect of the balance of his dues by attachment and sale of other properties of the judgment-debtors, who claim that S. 168A, Ben. Ten. Act, which came into force in January 1941, is a bar to the proceedings. On behalf of the landlord appellant it is contended that as the tenure ceased to exist by merger as a result of his own purchase in the earlier execution proceedings the case falls within the terms of the proviso to sub-s. (1) (a) of S. 168A. The proviso runs as follows :

"Provided that the provisions of this clause shall not apply if, in any manner other than by surrender of the tenure or holding, the term of the tenancy expires before an application is made for the execution of such a decree or certificate."

Mr. Hemendra Chandra Sen who appears on behalf of the appellant concedes that the present case is on all fours with the case in 46 C. W. N. 684¹ decided by a Bench to which my learned brother Blank was a party; it was there held (1) that 'merger' was one of the methods by which the term of a tenancy might expire within the meaning of the proviso, and (2) that the words "before an application is made for execution of such a decree" as used in S. 168A (1) (a) proviso refer to the first or initial application for execution and not to the subsequent proceeding which is started by the landlord after the defaulting tenure is purchased by him in execution of the same decree. Mr. Sen while conceding that the decision defeats the appeal has however pressed us to reconsider the terms of the proviso the interpretation of which is indeed a matter of some difficulty. So far as the first point decided in the case cited is concerned, a similar decision had been reached just previously in 46 C. W. N. 540² and I do not consider it necessary to refer further to it. I propose to examine the second point.

In the first place it is to be noted that in the case cited the word "expires" in the proviso has been interpreted as if it stood for "has expired whether before or after the commencement of the Bengal Tenancy (Amendment) Act, 1940." A retrospective effect has been given to the proviso itself and to the fact of expiry, which seems hardly justified by the word used. It is true that the section is clearly intended to apply to pending execution proceedings and has some retrospective effect, but it would not follow from this that

1. ('42) 29 A. I. R. 1942 Cal. 478 : 202 I. C. 147 : I. L. R. (1942) 2 Cal. 397 : 75 C. L. J. 267 : 46 C. W. N. 684, *Atul Chandra v. Upendra Narayan*.
2. ('42) 29 A. I. R. 1942 Cal. 429 : 201 I. C. 24 : 75 C. L. J. 190 : 46 C. W. N. 540, *Satish Chandra Hui v. Sudhir Krishna Ghose*.

a the proviso itself included the case of an expiry of term taking place before the commencement of the amending Act. On the other hand, the interpretation given to the phrase "before an application is made for execution of such a decree," though disposing of an apparent unfairness as regards some purchase in execution prior to the Act, may have the opposite effect in regard to purchases made after it.

We may consider four types of cases of purchase of a tenancy in execution of a rent decree for its own arrears of rent viz., (1) purchases made after the amending Act of b 1940 where the landlord is the auction purchaser, (2) similar purchases where there is a stranger auction purchaser, (3) purchases made before the Act where the landlord is the auction purchaser, and (4) similar purchases where a stranger is the auction purchaser.

In the case of purchases made after the amending Act the scheme of S. 168A is such that in form the decree is satisfied wholly as a result of the purchase. If a stranger purchases then whatever his bid, he has, under the terms of sub-s. (1) (b), to make up the deficit, if any, by a sufficient sum to meet the whole decree, costs, and arrears to date of c confirmation of the sale. If the landlord purchases the satisfaction is complete in form, though illusory, as the landlord has merely the pleasure of paying himself any real deficit which exists between the proper value of the property which we may assume to be represented by his bid and the total dues including arrears. (That the term 'purchaser' in subsection (1) (a) includes a decree-holder auction purchaser has been held in a case recently decided by Mukherjea and Pal JJ. namely, (S. M. A. No. 29 of 1942³ dated 4th June 1943) a decision with which I respectfully agree.) In either case no question of further execution d by attachment and sale of property of the judgment-debtor in respect of the particular decree can arise, the decree having been satisfied. No problem arising out of a difference between the two cases as a result of the fact of merger in the case of the landlord's purchase can arise.

In the case of purchases made before the amending Act, since sub-s. 1 (b) was not in force at that time, then, if the bid of either a landlord auction purchaser, or of a stranger auction purchaser was not sufficient to meet the decree, there was a balance due which the landlord might realise. If the landlord was the purchaser there was a merger, and the

tenancy ceased to exist. If the word "expires" in the proviso to sub-s. (1) (a) is interpreted as including a meaning "has expired before the commencement of the Bengal Tenancy Amendment Act, 1940" then the landlord will be able to take out execution by attachment and sale of other property of the judgment-debtor after the introduction of the amendment, unless the phrase "before an application is made for execution of such decree" is given the meaning "before the first or initial application is (or has been before the commencement of the Bengal Tenancy Amendment Act) made for execution of the decree." Unless the latter interpretation is also given there will be hardship or apparent unfairness in distinguishing the effects in the case where the landlord was the purchaser from that where he was not. If the word "expires" is not given the wider interpretation, there will be no difference between the two cases.

In passing it may be noted here that in 46 C.W.N. 684¹ cited above it is suggested that a case of hardship may arise when the purchaser (under the old Act) was a stranger, as the landlord would lose the benefit of sub-s. 1 (b). With respect, it may be pointed out that if sub-s. 1 (b) had been in force at the time of the previous purchase, and the property was not worth more than the bid, the stranger would probably not have bought the property at all, the landlord would have been forced himself to purchase and there would have been no benefit to obtain under the sub-section. At best the hardship is of a somewhat theoretical character.

I foresee some difficulty and unfairness arising in the future if the interpretation given in 46 C. W. N. 684¹ to the phrase "before an application is made for execution of such a decree" is adopted. A permanent tenancy may 'expire' owing to the operation of various other factors besides merger, e. g., by h annulment of a patni under the Revenue Sale Law, or of a holding under S. 167, Ben. Ten. Act. A tenancy for a term will expire at the end of its period. Suppose the first or initial application made after the Act for execution of a decree is dismissed for default and the tenancy expires in one of these ways, is there any reason why a second application for execution in respect of other property should not be made? Or suppose such a tenancy expires during the first execution proceeding, rendering it infructuous, there seems to be no reason why the landlord should be worse off than if he had happened to wait long enough for the prior extinction of the tenancy to take place. The ordinary meaning of the phrase

3. Reported in ('44) 31 A I.R. 1944 Cal. 199, Phani Bhusan Mukherjee v. Purna Chandra Bagehi.

- a "before an application is made for execution of such a decree" is scarcely stretched if we take it as referring to the particular application which is otherwise barred under sub-s. 1 (a), but for the operation of the proviso. As noted above, the question of merger as a result of a sale in execution of the decree for rent can give rise to no trouble so far as sales after the Act are concerned. We may add that, by the operation of sub-s. (3), executions started prior to the Act against property other than the tenancy in default will be forced into a similar position. With great respect therefore I think that the proper interpretation to be given to the phrase in question is that 'expires' refers to expiry after the commencement of the amending Act of 1940, and that "an application" refers to the particular application which is otherwise barred under sub-s. 1 (a), but for the operation of the proviso. The proviso as a whole is to be taken as permitting the landlord to proceed against other property of the judgment-debtor if he can show that the tenancy has expired after the commencement of the amending Act and before the application made to proceed against such property. The result, so far as this appeal is concerned, is the same whether this interpretation is followed or that in 46 C.W.N. 684.¹
- b
- c

I am aware that by following the above interpretation with regard to the word "expires," we only remove one type of difficulty by creating another. The interpretation solves the present case, giving the same answer as in 46 C.W.N. 684,¹ but it leaves a case of hardship where a tenancy has expired in one or other of the ways suggested above before the new amendment came into force, and if the landlord is unable to use any other means of execution besides attachment and sale of property of the judgment-debtor, other than the tenancy in default. The result is that this appeal is dismissed. There will be no order as to costs.

Blank J. — I have had the advantage of perusing the draft of the judgment which has just been delivered by my learned brother and concur in the proposed order, viz., that the appeal is dismissed. So far as the facts of the present case are concerned, the decision in 46 C. W. N. 684¹ to which I was a party, appears to me, with respect, to dispose of the matter.

G N.

*Appeal dismissed.***A. I. R. (31) 1944 Calcutta 206****B. K. MUKHERJEA AND PAL JJ.**

*Commissioner of Wakfs, Bengal —
Defendant—Appellant
v.*

*Shahebzada Mohammed Zahangir Shah
and others—Respondents.*

Appeal No. 1534 of 1940, Decided on 25th May 1943, from appellate decree of Addl. Dist. Judge, Second Court, 24-Parganas at Alipore, D/- 8th June 1940.

(a) Bengal Wakf Act (13 of 1934 as amended by Act 4 of 1936), Ss. 46A, 70 and 71—Suit for declaration that remarks in cadastral survey that suit plot was "pirostan" were wrong and that order of Commissioner enrolling plot as wakf was illegal—Suit held did not come within S. 80, Civil P. C. — Procedure in adding Commissioner on plaintiff's application held irregular—S. 46A held did not apply.

The cadastral survey record recorded the suit plot as the secular property of the plaintiff in the plaintiff's possession but with the remarks "Pirostan for use of Mahomedan public." The plaintiff instituted a suit for a declaration that the remarks in the cadastral survey khatian were wrong. Six persons were named by him in his plaint as the defendants representing the Mahomedan public. Subsequently the Commissioner of Wakfs enrolled the suit plot as wakf under S. 29 of the Act without any notice to the plaintiff. Thereafter on the plaintiff's application for amendment of the plaint the Commissioner of Wakfs, Bengal, was added as a defendant in the suit, and the plaint also was amended by the addition of prayer 2 (a) which ran thus: "To declare that the decision of the Commissioner of Wakfs, Bengal, that the property in suit is wakf is illegal and ultra vires:"

Held that (1) the act in respect of which the relief for declaration of entries in cadastral survey as wrong was asked could in no way be said to be the act of the Commissioner and therefore no notice in respect of it was necessary under S. 80, Civil P. C. By the addition of the Commissioner as a party defendant, the suit itself did not change its character so as to bring in the question of notice under S. 80, Civil P. C.; [P 210d,e]

(2) in respect of the relief 2 (a) the Commissioner was neither a necessary nor a proper party, though under S. 70 of the Act he was entitled to a notice and under S. 71 he could intervene. No question of notice under S. 80, Civil P. C., would arise in such a case; [P 210f]

(3) the procedure adopted in adding the Commissioner of Wakfs as a party defendant was irregular. The procedure under Ss. 70 and 71 ought to have been followed. But as the Commissioner contested the claim on its merits he must be deemed to be an intervener under S. 71. The irregularity in the procedure did not affect the merits of the case or the jurisdiction of the Court. Assuming that the order of enrolment of the plot as wakf implied a decision that the property was wakf and further assuming that even such implied decision required revocation, in the facts of the case S. 46A was not at all attracted. [P 211a,b,c,d]

(b) Civil P. C. (1908), S. 2 (17) (h) — Words "public" and "public duty" in S. 2 (17) (h) — Meaning of (*Obiter*).

^a The expression 'public duty' in S. 2 (17) (h) refers to duty concerning the affairs or service of the public. The word 'public' may include any class of the public or any community. [P 210c]

C. P. C. —

('40) Chitaley, S. 2 (17), N. (h).

('41) Mulla, Page 16 Note "Public Officer."

(c) Bengal Wakf Act (13 of 1934), Chap. 3—Commissioner of Wakfs is public officer within S. 80, Civil P. C. (*Obiter*).

Public wakfs are public, religious or charitable endowments, and the Commissioner of Wakfs who functions in relation to such public endowments in general may be said to perform a public duty and therefore is a public officer within S. 80, Civil P. C. [P 210c,d]

^b (d) Bengal Wakf Act (13 of 1934 as amended by Act 4 of 1936), Ss. 46A, 27 and 92 — "Decision" of Commissioner and "order made under Act"—Distinction—Suit to set aside "decision" of Commissioner that property is wakf—Notice under S. 80, Civil P. C.

A "decision" of the Commissioner and "an order made under the Act" by him stand on different footings. When any wakf is enrolled by the Commissioner the enrolment may imply two things, namely, (1) a decision that the property is wakf and (2) an order of enrolment. No suit lies for setting aside the order. But the decision is always subject to revocation or modification by a competent Court. So far as the decision is concerned the Commissioner discharges a quasi judicial function and in a suit for revoking or modifying the decision he is not at all a necessary party. It should not be a suit against the Commissioner at all in his capacity as the officer giving the decision. But even in such a suit the Commissioner may be entitled to a notice under S. 70 of the Act and may intervene under S. 71 of the Act. When he comes in as intervener the suit does not become a suit against him in respect of any act purporting to be done by him in his official capacity so as to attract S. 80, Civil P. C. [P 210h; P 211a]

A. Asir for Abul Quasem No. 2—for Appellant.

Sarat Chandra Janah, Syed Farhat Ali and M. M. Effendi—for Respondents.

^a **Pal J.** — This appeal is by the Commissioner of Wakfs, Bengal, the added defendant 9 in a suit for a declaration that the entries in the Cadastral Survey Khatian No. 866 in respect of Cadastral Survey Dag No. 1118/1341 in the remark column as "Pirosthan for use of Mahomedan public" and in the Northern boundary column as 'Hedayetulla' are incorrect. The cadastral survey record was finally published on 7th September 1931, and the present suit was instituted on 29th July 1937. The Khatian No. 866 is Ex. D in this case, and it relates to a lakheraj comprising more than 50 plots of lands. Yusuf Sultan, the original plaintiff, is recorded as one of the cosharers of this lakheraj. Plots Nos. 1118/1341, 1119, 1118/1366 and 1118/1367 are recorded as being in the possession of Yusuf Sultan, though in the remarks column against the first two of these plots the right of user of the Mahomedan public is also entered. Of these the present

suit relates only to the entries in respect of the Dag No. 1118/1341. Admittedly, the entry regarding its Northern boundary is wrong. The dispute relates only to the entry in the remarks column. The plaintiff's case is that this plot of land is his secular property in his personal enjoyment. It is not a Pirosthan and the Mahomedan public has no right of user in it. The entry in the remarks column of the khatian against this plot describing it as 'Pirosthan,' the Mahomedan public having right to use it (*Pirsthan-Musalman sadharaner byabaharjya*), is wrong.

As has been stated above, the cadastral survey record recorded the plot as the secular property of the plaintiff in the plaintiff's possession but with the above remarks. The plaintiff instituted the present suit on 29th July 1937, for a declaration that these remarks in the cadastral survey khatian were wrong. Six persons were named by him in his plaint as the defendants representing the Mahomedan public under O. 1, R. 8, Civil P. C., and he took the necessary permission of the Court for the purpose. The notice of the institution of this suit was given to the Mahomedan public by public advertisement. Summonses on the defendants were issued on 31st July 1937, and were served on them on 6th August 1937. It appears from Ex. B that on 26th August 1937, the Commissioner of Wakfs, Bengal, enrolled Cadastral Survey Dag No. 1341 as wakf under S. 29, Bengal Wakf Act, 1934. Defendants 3 and 6 appeared on 30th August 1937, and took time for filing written statements. Defendants 3 and 6 filed a written statement on 20th September 1937. One Syed Osman Ali appeared and got himself added as defendant 7 on 20th September 1937. He filed his written statement on 27th September 1937. Later on, on 3rd May 1938, one Majibar Rahaman Molla appeared and got himself added as defendant 8. He filed his written statement on 12th May 1938. The original plaintiff was Sahebzada Mahammad Yusuf Sultan. He died during the pendency of the suit and on his death the original defendant 3 Sahebzada Mohammad Jahangir Shah, became substituted in his place as his heir and legal representative on 5th December 1938.

It appears that defendants 7 and 8 in their written statements stated that the Commissioner of Wakfs, Bengal had declared the disputed property to be wakf property under the provisions of the Bengal Wakf Act. The substituted plaintiff on 19th December 1938, applied for amendment of the plaint by adding the Commissioner of Wakfs, Bengal, as defendant 9 in the suit. This application was

a granted on 5th January 1939, and the Commissioner of Wakfs, Bengal, appeared on 10th February 1939, and filed his written statement on 25th February 1939. The plaint also was amended by the addition of prayer 2 (a) which ran thus :

"To declare that the decision of the Commissioner of Wakfs, Bengal, that the property in suit is wakf is illegal and ultra vires."

The case of the defendants, relevant for the purposes of the present appeal, is to be found in Paras. 6 and 8 of the written statement of defendants 3 and 6, Paras. 9, 11, 12, 14 and 15 of the written statement of defendant 7, Paras. 11, 13, 14, 16 and 17 of the written statement of defendant 8 and Paras. 3, 4, 10, 12, 14 and 17 of the written statement of defendant 9, the Commissioner of Wakfs, Bengal. The defendants in substance allege that the property is not the secular property of the plaintiff and is not in his possession and enjoyment, that it is "a wakf property dedicated to God and appertains to the adjoining public mosque on plot No. 1119", that there have been on this wakf property from time immemorial tombs, burial grounds, Darga of Saint known as Pagla Pir and a Musafirkhana for the pilgrims visiting the sacred place, that annual fairs and periodical ceremonies are held here and pilgrims and local people frequently visit the place for religious purposes and devotion and that the entries in the remark column of the Cadastral Survey Khatian as *Pirsthan-Musalman sadharaner byabaharjya* were correct. The Commissioner of Wakfs, Bengal, also pleads that the suit is liable to be dismissed as against him for want of notice under S. 80, Civil P. C., that it is not maintainable under S. 42, Specific Relief Act, and that it having been

d "determined and duly enrolled by him as a valid wakf under the provisions of the Bengal Wakf Act, 1934, the decision of the Commissioner of Wakfs, Bengal, cannot be avoided except by a proper and regular suit brought in a competent Court for the purpose."

On these pleadings no less than 20 issues were raised in this case, of which issues 1, 5, 6, 9, 12, 16 and 18 relate to the questions raised in the present appeal. Issue 1 is "Is the suit maintainable in its present form?" and this is the issue which was taken to include the question whether the suit is maintainable as against the Commissioner of Wakfs, Bengal, without any notice under S. 80, Civil P. C. Issue 12 relates to the infirmity alleged in view of S. 42, Specific Relief Act, and stands thus : "Is the suit barred by the provisions of S. 42, Specific Relief Act?" Issue 16 stands thus:

"Is the property in suit a public wakf property? Can the decision of the Commissioner of Wakfs, Bengal, determining the same as valid wakf, be avoided by means of the present suit?"

Issue 5 is

"Are the entries in settlement Khatian No. 866, with regard to the plot in suit in the remark column as also respecting the northern boundary incorrect?"

Issues 6, 9 and 18 are really repetitions of this issue 5 in different languages and forms. The learned Subordinate Judge decreed the suit of the plaintiff overruling the contentions of the defendants and made the following declaration :

"It is declared that the entry in the remark column of Khatian No. 866 in respect of C. S. 1341 and the northern boundary of that plot is incorrect." No declaration was made in terms of the added prayer 2 (a) as stated above. In their written statements the defendants denied that the land in suit was ever the secular property of the plaintiff's predecessors. At the hearing of the suit, however, they seem to have given up this contention in view of the evidence adduced by the plaintiff in proof of his title. On this evidence the learned Subordinate Judge found that the land belonged to the plaintiff's predecessors as their secular property. The learned Judge then noticed that it was not the defence case that by any express dedication the land became wakf. He also noticed that there was no evidence of any dedication at any time. The defendants contended that by 'tradition and reputation' the land was wakf and relied on the following user of the land to establish its wakf character : 1. User as a burial ground. 2. User for the ceremonies in connexion with Urs. 3. User as part of the public mosque on C. S. Plot No. 1119.

Admittedly in some portion of the disputed plot there are some tombs. The learned Subordinate Judge found that these were all tombs of the deceased members of the plaintiff's own family. The story that there were tombs of outsiders was found to be altogether unfounded. As regards Urs ceremonies the learned Subordinate Judge did not accept the evidence of such user from time immemorial. As regards the alleged public mosque on C. S. Plot No. 1119, the learned Subordinate Judge found that there was no such mosque on it and that the disputed land never formed part of the C. S. Plot No. 1119 and was never used as of right for any of the purposes of the alleged mosque. He therefore, found the entry in question in the C. S. record to be wrong. As regards issue 12 the learned Subordinate Judge found that the plaintiff was not ousted from the land and consequently was entitled to have the declara-

a tion prayed for without seeking any consequential relief. As regards issue 16 the learned Subordinate Judge held that as the enrolment of the property as wakf was made during the pendency of the present suit, the order was ultra vires. As regards the notice under S. 80, Civil P. C., the learned Subordinate Judge was of opinion: (1) that the Commissioner of Wakfs was not a public officer within the meaning of S. 80, Civil P. C., though he was a public servant within the meaning of S. 21, Penal Code, and (2) that in any case in view of S. 70, Bengal Wakf Act, 1934, on a proper construction of the Act, the Commissioner b is not entitled to any notice under S. 80 Civil P. C.

From the above decree of the learned Subordinate Judge, the Commissioner of Wakfs and another defendant preferred two separate appeals to the District Judge. These were Title Appeals Nos. 31 and 59 of 1940 of the Second Court of the Additional District Judge at Alipore. The plaintiff neither preferred any appeal nor took any cross-objection to the decree. The learned Additional District Judge dismissed the appeals and confirmed the judgment and decree of the Court of first instance.

c The present appeal is from this decree of the learned Additional District Judge. In the Court of appeal below the defendants did not question the finding that the land in suit once belonged to the plaintiff's predecessors in secular right. Nor did they make any case of express dedication by the plaintiff or his predecessors. It further appears that they did not make any case that apart from the property being a public wakf, the Mahomedan public had any other right of user in it acquired in any other way. The only case urged by them seems to have been that there was a public mosque on Plot No. 1119 and d that the disputed land became wakf by long user for the purposes of this public mosque. The learned Additional District Judge, however, found on the evidence on the record that there was no mosque on Plot No. 1119 and that the suit land was never used for the purposes of any public mosque.

As regards the notice under S. 80 Civil P. C., the learned Judge upheld the view of the Subordinate Judge that the Commissioner of Wakfs was not a public officer within the meaning of S. 80, Civil P. C. The questions raised in issues 12 and 16 were not urged before the learned Additional District Judge. The learned Advocate appearing in support of the appeal before us contends: (1) That in view of the entry in the C. S.

record regarding Plot No. 1119 and in view of the pleadings of the parties, the Courts below went wrong in holding that there was no public mosque on the plot and in basing their decision regarding the disputed plot on their finding about Plot No. 1119. (2) That the Court of appeal below went wrong in holding that the Commissioner of Wakfs was not a public officer within the meaning of S. 80, Civil P. C., and was not entitled to a notice of the present suit under that section. (3) That in view of the provisions of S. 46A, Bengal Wakf Act, 1934, and in view of the fact that the land in suit was enrolled as wakf property by the Commissioner of Wakfs f under the provisions of the Act the present suit was not maintainable (a) as there was no prayer for setting aside or modifying the decision of the Commissioner (b) as there was no notice given to the Commissioner under S. 80, Civil P. C.

The Plot No. 1119 is also recorded in Khatian No. 866. The entry in the C. S. record does not support the case of the defendants that the plot is a wakf property. No doubt it is described as having a masjid on it and in the remarks column it is stated to be in the possession of Yusuf Sultan but with right of user by the Mahomedan public. The plaintiff g in the present suit did not claim any relief in respect of this Plot No. 1119 and hence did not make any case regarding it in the plaint. The defendants, however, in their written statement claimed this plot as wakf property having a public mosque on it and asserted that the suit land appertained to this wakf and was always used as such for the purposes of this mosque. The plaintiff denied this and hence both parties adduced evidence in support of their respective cases in respect of this Plot No. 1119. On this evidence both the Courts found that the alleged mosque on h Plot No. 1119 is not a mosque at all and the suit land does not appertain to the estate of that mosque. We do not find any error of law or of procedure that would entitle us to interfere with this finding of fact arrived at by the Court of appeal below. The relevant portion of S. 80, Civil P. C., stands thus :

"No suit shall be instituted . . . against a public officer in respect of any act purporting to be done by such officer in his official capacity, until the expiration of two months next after notice in writing has been . . . delivered to him or left at his office . . ."

Thus a notice under this section will be required only: (1) if the Commissioner of Wakfs, Bengal, be a 'public officer', (2) if the suit be in respect of any act purporting to be done by him in his official capacity.

a Both the Courts below have held that the Commissioner of Wakfs, Bengal, is not a 'public officer' within the meaning of this section of the Code of Civil Procedure. We, however, do not feel so sure as to this. Section 2 (17) of the Code defines "public officer." In the Code of Civil Procedure, unless there is anything repugnant in the subject or context, the expression 'public officer' must be taken to mean what is defined in S. 2 (17). There the expression is defined to mean a person falling under any of the eight different descriptions given in cls. (a) to (h). Clause (h) gives the following description :

b "every officer in the service or pay of the Government, or remunerated by fees or commission for the performance of any public duty."

We are not sure if the Commissioner of Wakfs is not in the service of the Government. Sections 16 to 22, Bengal Wakf Act, 1934, deal with his appointment, salary and legal position. His duty and functions are prescribed by the provisions made in Chap. 3 of the Act. We do not see why he cannot be said to be in the service of the Government. According to the definitions given in the General Clauses Act 'Government' or 'the Government' includes the 'local Government' (now, Provincial Government) as well as the Central Government. Again we are not sure why he cannot be said to be performing a public duty within the meaning of the above definition. The expression 'public duty' refers to duty concerning the affairs or service of the public. The word 'public' in our opinion may include any class of the public or any community. At least in one statute (*viz.*, the Penal Code, *vide* S. 12) the word is expressly used in this sense. Public wakfs are public, religious or charitable endowments, and one who functions in relation to such public endowments in general may be said to perform a public duty. The question, however, does not fall to be decided in the present case as, in our opinion, the present suit is not of the type contemplated by S. 80, Civil P. C.

d The suit is for a declaration that certain entries in the Cadastral Survey record are wrong. The act in respect of which this relief is claimed can in no way be said to be the act of the Commissioner of Wakfs. So far as this relief is concerned, certainly no notice under S. 80, Civil P. C., need be given to the Commissioner of Wakfs. The Commissioner may be entitled to a notice of such a suit under S. 70, Bengal Wakf Act, 1934, and may himself intervene in the suit under S. 71 of the Act or may be made a party defendant by the plaintiff quite unnecessarily. In none of

e these cases a notice under S. 80, Civil P. C., is needed. By the addition of the Commissioner of Wakfs as a party defendant the suit itself does not change its character in this respect so as to bring in the question of notice under S. 80, Civil P. C.

The Commissioner contends that the addition of the prayer 2 (a) converted the suit into one in respect of an act purporting to be done by him in his official capacity. One short answer to this contention is that this relief has not been granted and so far as this relief is concerned the matter is no longer before us. Further, even in a suit for this relief the Commissioner is neither a necessary nor a proper party, though S. 70, Bengal Wakf Act, may make it incumbent upon the Court in such a suit to give notice of this suit to the Commissioner leaving it to him to see if he should come in under S. 71 of the Act. Obviously no question of notice under S. 80, Civil P. C., would arise in such a case. Section 46A, Bengal Wakf Act, 1934, was inserted by S. 3, Bengal Wakf (Amendment) Act, 1935 (Bengal Act 4 of 1936). The section stands thus :

"Any question whether a particular property is wakf property or not . . . shall be decided by the Commissioner whose decision, unless revoked or modified by a competent Court, shall be final . . ."

This Act also amended sub-cl. (a) of cl. (1) of S. 27 by inserting the words 'and determining' after the word "investigating" in it. After this amendment cl. 1 (a) of S. 27 stands thus : "the functions of the Commissioner shall include investigating and determining the nature and extent of wakfs and wakf property..." It will be pertinent to notice the provisions of S. 92 of the Act in this connexion. The section says : "No suit shall be brought in any civil or revenue Court to set aside or modify any order made under this Act" It would thus appear that "a decision" of the Commissioner and "an order made under the Act" stand on different footings. When any wakf is enrolled by the Commissioner this enrolment may imply two things, namely, (1) a decision that the property is wakf and (2) an order of enrolment. No suit lies for setting aside the order. But the decision is always subject to revocation or modification by a competent Court. So far as this decision is concerned, the Commissioner discharges a quasi-judicial function and in a suit for revoking or modifying this decision he is not at all a necessary party. It should not be a suit against this Commissioner at all in his capacity as the officer giving the decision. But even in such a suit the Commissioner may be entitled to a notice under S. 70 of the Act and

a may intervene under S. 71 of the Act. When he comes in as intervener the suit does not become a suit against him in respect of any act purporting to be done by him in his official capacity. As has been pointed out above, prayer No. 2 (a) in the present case was "for a declaration that the decision of the Commissioner of Wakfs, Bengal, that the property in suit is wakf, is illegal, wrong and ultra vires." Even for this relief the Commissioner as the deciding officer was not a necessary party. Rather, it would be improper to add him as a party defendant in his capacity of the officer giving the decision. But, at the same time, he as Commissioner of Wakfs was entitled to a notice of the suit under S. 70 of the Act and was entitled to intervene under S. 71 of the Act. In this case the procedure adopted in adding him as a party defendant was irregular. But as the Commissioner contested the claim on its merits we do not see why we should not treat him as an intervener under S. 71 of the Act. The irregularity in the procedure adopted has not in the least affected the merits of the case or the jurisdiction of the Court.

The next contention of the Commissioner is that if the decree of the Court below be taken as one of refusal of the relief claimed in prayer No. 2 (a), then the suit must fail, the decision in question of the Commissioner having become final under S. 46A of the Act. We are unable to accept this contention of the appellant. We have not been shown any express decision of the Commissioner that the land in suit is a wakf. Section 27 (1) (a) of the Act, as it now stands, makes the function of the Commissioner to investigate and determine the wakf property. Nothing could be placed before us showing any such determination of the question excepting the ex parte order of enrolment as wakf. There is thus no express decision in this case that requires to be revoked under S. 46A of the Act.

d Assuming that the order of enrolment implies a decision that the property is wakf and further assuming that even such implied decision requires revocation, we are of opinion that in the facts of this case S. 46A is not at all attracted. As has been pointed out above, the present suit was instituted before the Commissioner made any order of enrolment. Further the order in question was made without any notice to the plaintiff who was recorded in the Cadastral Survey Khatian as the person in possession. Such an order did not imply any decision available against the plaintiff. At any rate there is nothing in the Act which would take away the jurisdiction of the Court

to try the suit already instituted by reason of such subsequent order made by the Commissioner. The order in our opinion cannot affect the result of the suit to which everyone interested in the matter including the Commissioner of Wakfs is a party. All the contentions raised by the appellant thus fail and the appeal is dismissed. The parties will bear their own costs in this appeal.

B. K. Mukherjea J. — I agree.

G.N.

Appeal dismissed.

A. I. R. (31) 1944 Calcutta 211

B. K. MUKHERJEA AND SEN JJ.

Pratap Mull Bagaria and another — Appellants

v.

Sree Sree Iswar Gopal Jiew Thakur represented by N. N. Rudra and another — Respondents.

Appeals Nos. 20 and 173 of 1939, Decided on 25th August 1943, from original decrees of President, Calcutta Improvement Tribunal, D/- 31st August 1938.

(a) Hindu law—Alienation—Shebait—Power of to grant perpetual lease at fixed rent.

It is a breach of duty on the part of a shebait, unless constrained thereto by unavoidable necessity, to grant a lease in perpetuity of debattar lands at a fixed rent, however, adequate that rent may be at the time of granting, by reason of the fact that by this means the debattar estate is deprived of the chance it would have, if the rents were variable, of deriving benefit from the enhancement in value in the future of the lands leased : ('17) 4 A. I. R. 1917 P. C. 33, *Rel. on.* [P 214h]

Hindu Law —

('40) Mulla, Page 483 Note "Permanent lease," Page 481 S. 415.

('38) Mayne, Page 929 Para. 797; Page 930 Para. 798; Page 931 Para. 799.

(b) Hindu law—Alienation—Shebait—Legal necessity—What is.

Preservation of the debattar property from extinction is undoubtedly a justifying necessity which would support a permanent alienation made by the shebait but it is absurd to speak of preserving a property which is itself the subject-matter of alienation. No shebait is at liberty to alienate the property simply because it might be of advantage or financial benefit to the deity. [P 216a,c]

The shebait being incapable of rebuilding a house belonging to the deity and making proper repairs to another house of the deity which would prevent it from tumbling down leased both the houses in perpetuity with the object of preventing the income from the houses being lost the lessee undertaking to rebuild one of the houses and to keep the other in proper repairs and pay rent for them on the footing that they were house properties and not vacant lands :

Held that the fact that the deity would be benefited by the permanent leases would not by itself make out a case of legal necessity unless it was proved that the income of the houses was absolutely necessary to maintain the endowment and that the

endowment would materially suffer if the income of that property was lost. [P 216f,g]

Hindu Law —

('40) Mulla, Page 481 S. 415.

('38) Mayne, Page 929 Para. 797; Page 930 Para. 798; Page 931 Para. 799.

(c) Hindu law—Alienation—Shebait—Legal necessity — Presumption as to — Permanent lease by shebait — Lease not challenged for long time — Legal necessity held could be presumed.

Although a shebait for the time being has no power to make a permanent alienation of a temple property in the absence of proved necessity for the alienation, yet the long lapse of time between the alienation and the challenge of its validity is a circumstance which entitles the Court to assume that the original grant was made in exercise of that extended power. [P 217b]

A shebait granted permanent lease of the debattar property reciting facts which by themselves were not sufficient to constitute legal necessity justifying the alienation. But the validity of the permanent leases had not been questioned for a long period of time extending for over half a century, and although three shebait had succeeded to the debattar estate one after another since the death of the shebait who had leased the property none of them impeached the propriety of the leases :

Held that as the lease deed was old the recitals therein as to the object with which the lease was executed could be taken into account in determining the question whether the lease was for legal necessity or not : ('16) 3 A.I.R. 1916 P. C. 110, *Rel. on.* [P 217c]

Held further that in the circumstances a presumption in favour of legal necessity for the permanent lease could be made : 19 Mad. 485 and ('22) 9 A. I. R. 1922 P. C. 163, *Rel. on.* [P 217c]

Hindu Law —

('40) Mulla, Page 481 S. 415.

('38) Mayne, Page 929 Para. 797.

(d) Limitation Act (1908), Art. 134B—Alienation by shebait—Suit to set aside—Terminus a quo.

Under Art. 134B the terminus a quo for a suit to set aside an alienation made by a shebait has been rigidly fixed and begins from the date of death or cessation of office of the alienating shebait and the Legislature has deliberately avoided all questions of adverse possession after the death of such shebait. Therefore, under Art. 134B, a suit to set aside an invalid alienation by a shebait is barred after the lapse of twelve years from the death or removal of the alienating shebait. The right to bring such suit does not revive on the death or removal of each succeeding shebait : *Case law discussed.* [P 218h]

Limitation Act —

('42) Chitaley, Art. 134B Notes 5, 9 and 10.

('38) Rustomji, Page 1212 Note "Adverse idol;" Page 1211 Pt. 5.

(e) Limitation Act (1908 as amended in 1929), Arts. 134B and 144 — Alienation by shebait — Suit to set aside — Law applicable before amendment.

Under the law as it stood prior to the introduction of Art. 134B in the Limitation Act by the amending Act of 1929 a suit to set aside an alienation by a shebait was governed by Art. 144 and the period

of limitation was 12 years from the date when the alienee's possession became adverse. The possession of the alienee would not become adverse so long as the alienating shebait was holding office. After his death, resignation or removal the possession of the alienee would be adverse but it would be open to the succeeding shebait to accept the lease and in that case possession would not become adverse unless a shebait came into office who did not recognise the alienation as binding : ('22) 9 A. I. R. 1922 P. C. 123, *Rel. on.* [P 219d,e]

Limitation Act —

('42) Chitaley, Art. 134B N. 5.

('38) Rustomji, Page 1210 Pt. 6.

(f) Limitation Act (1908 as amended in 1929), Art. 134B — Alienation of debattar property before amending Act—Suit to set aside—Right to sue accruing after amendment — Art. 134B applies.

No doubt the general principle is that the law of limitation applicable to a suit is the law in force at the date when such suit is instituted. If, however, the result of applying such law of limitation is to take away a vested right, e. g., a right of suit such intention could not be imputed to the Legislature unless it is expressed in unequivocal language. Where the debattar property was alienated before the amending Act came into force but the right to sue to set aside the alienation accrued to the manager of the deity after the amending Act of 1929 came into force, there can be no question of taking away any right accrued prior to the passing of the amending Act and therefore Art. 134B applies : ('37) 24 A. I. R. 1937 Cal. 305, *Rel. on.*; ('14) 1 A. I. R. 1914 Cal. 806 (F.B.), *Expl.* [P 219c,e,f]

Limitation Act —

('42) Chitaley, Art. 134B N. 3; Preamble Note 15 Pts. 1 and 10.

('38) Rustomji, Page 1209 Pts. 2 and 3.

(g) Limitation Act (1908), Art. 134B—Idol—Right to sue is vested in shebait — Art. 134B bars right of shebait as well as of deity.

The right to sue is vested in the shebait of an idol and not in the deity. It is therefore not correct to say that Art. 134B bars the right of the shebait but not of the deity to recover debattar property after the lapse of twelve years from the date of the death or removal of the alienating shebait : 32 Cal. 129 (P.C.), *Rel. on.* [P 219f]

Hindu Law —

('40) Mulla, Page 479 Pt. (j).

('38) Mayne, Page 927 Pt. (r).

Dr. S. C. Basak, Bhagirath Chandra Das and Manohar Chatterjee (in 20), Panchanan Ghose, Durga Das Roy and Upendra Chandra Mallick (in 173) — for Appellants.

Panchanan Ghose and Upendra Chandra Mallick for 1, Hira Lal Chakravorty and Inder Ch. Ghose for 2, (in 20), Dr. S. C. Basak and Bhagirath Chandra Das for 1 to 3, Amarendra Nath Bose, Bijan Behari Mitter, P. C. Mallick for Surendra Madhab Mallik and Gopendra Kr. Basu Mallik for 4, Hira Lal Chakravorty and Indir Chandra Ghose for 5 (in 173) — for Respondents.

B. K. Mukherjea J. — These two appeals are directed against a judgment of the President, Calcutta Improvement Tribunal, dated 31st August 1938, passed in an apportionment

a case arising out of a reference made to him by the First Land Acquisition Collector, Calcutta. The reference was made in connexion with the acquisition of premises No. 140 Cotton Street, Calcutta, which was acquired in pursuance of a declaration dated 22nd November 1934. Premises No. 140, Cotton Street, as it stands at present has been formed by amalgamation of a number of holdings which were originally numbered premises Nos. 140, 140/1 and 141 Cotton Street, 17 Burtola Street (excluding the temple) and 9/1 Narayan Prasad Babu Lane. The last two properties admittedly belonged to three persons who may be described as the Bagarias, at the time of the acquisition, while the Cotton Street properties were owned at all material times by a deity known as Iswar Gopal Jiew which is located at Chinsurah in the district of Hooghly. There were two permanent leases created in respect of these properties by the previous shebait of the deity; one, which was in respect of premises No. 140 and 140/1, Cotton Street, was ostensibly granted to one Nehal Chand Pandey at a fixed monthly rental of Rs. 25 while the other, which was created in favour of Bhairo Das Jahury, reserved a monthly rental of Rs. 90. It is admitted that c Nehal Chand was a mere benamidar of Bhairo Das, and both the leasehold interests are now vested in the Bagarias under a deed of assignment dated 24th January 1933.

One Gopal Das Singh Boid was the shebait of the deity Iswar Gopal Jiew from 1873 to 1900. On 19th January 1896, Gopal Das executed a usufructuary mortgage bond in favour of one Lal Behary Dutt of Chinsurah, hypothecating all the immovable properties of the deity, including the premises in Cotton Street mentioned above to secure a loan of Rs. 4955 annas odd, which represented the principal and interest of certain advances d made to Gopal Das during his minority. The terms of the mortgage bond were that the mortgagee would realise the rents and profits of the mortgaged properties and out of the same carry on the worship of the deity and meet all other expenses that might be necessary for preservation and management of the debattar estate. The balance that would remain would go towards the satisfaction of the money advanced which would carry interest at the rate of 4 per cent. per annum. In 1900 Gopal Das died childless leaving behind him his widow Annapurna as his sole heir in law. Annapurna, it appears, took out probate of a will left by her husband and she herself died in 1905. It has not been ascertained as yet as to who were the next heirs of Gopal Das

when Annapurna died and the question of e succession to the shebaitship of the deity still remains undecided. Two persons named Deo Sharan and Ram Lakhan laid claims to shebaitship as the nearest heirs of Gopal Das, and they figured as shebait of the deity in the land acquisition proceedings and also in the apportionment case before the President of the Tribunal. The learned President, however, came to the definite conclusion that these two men were perfect strangers and were not related in any way to Gopal Das, and this finding has not been challenged before us. One Panchu Gopal Misra also put forward his rights as a shebait in a redemption suit f brought by him in the Court of the Subordinate Judge at Hooghly. He was held to be a shebait by the trial Judge, but on appeal to the District Judge this claim was negatived. A second appeal, we are told, has been filed since then in this Court but it has not been heard as yet. The deity is represented before us by a pleader who was appointed its next friend by the President of the Tribunal.

The position therefore is that ever since 1896 when Gopal Das executed the usufructuary mortgage deed, it is the usufructuary mortgagee or his successors who are carrying on the worship of the deity and are in possession of the entire debattar estate. Lal Behary Dutt, the original mortgagee, died in 1900. After his death the estate left by him was the subject-matter of an administration suit in the original side of this Court, and Mr. G. C. Mandal, who was appointed receiver during the pendency of the suit, did, with the permission of the Court, put up to sale the mortgagee's interest which Lal Behary held in respect of the debattar properties including the Cotton Street premises mentioned above amongst the beneficiaries under the will of the said Lal Behary, and it was purchased by one Naba Kishore Dutt whose bid was the h highest. A deed of sale was duly executed in favour of Naba Kishore, by the receiver and other beneficiaries on 12th December 1918. Naba Kishore continued in possession of the debattar estate till 17th November 1933, when he assigned his interest as usufructuary mortgagee to two of the Bagarias by a deed of assignment executed on that date. In the award made by the Collector regarding the present premises No. 140 Cotton Street, the Bagarias were allowed Rs. 3,01,000, as compensation for their proprietary right in premises No. 17 Burtalla Street and 9/1 Narayan Prasad Babu Lane as they originally stood, and their permanent leasehold interest in old premises No. 140, 140/1 and 141 Cotton Street.

a It is admitted that out of this amount a sum of Rs. 1,58,000 represents the compensation awarded in respect of their permanent leasehold rights in the Cotton Street premises. The lessor's rights in old premises Nos. 140, 140/1 and 141 Cotton Street, which were vested in the deity, have been valued at 20 times the annual rental, and the total award in this respect amounting to Rs. 31,740 was allowed by the Collector jointly to the shebait of the deity and the two Bagarias as usufructuary mortgagees of the lessor's interest. The Collector's award is dated 2nd May 1935. There were three petitions for reference filed by three sets of claimants after this award was made. The first was by the Bagarias as usufructuary mortgagees, and their case was that the joint award of Rs. 31,740 to themselves along with the deity was improper, and as the mortgage money due to them amounted to more than Rs. 31,740 the total amount should have been given to them. The second application for reference was by the shebait of the deity and their grievance, in substance, was that the Bagaria claimants should not have been allowed anything as usufructuary mortgagees as the mortgage had been satisfied long before and they could not also claim compensation as permanent lessees as the alleged permanent leases not being supported by any legal necessity were not binding on the deity. The third petition for reference was presented by one Hrishikesh Sen who claimed to be a lessee for 99 years in respect of the said properties under the deity and whose claim was rejected by the Collector on the ground that his title accrued after the date of declaration.

On the basis of these petitions the Collector made a reference on 2nd August 1935, and on 12th August following it was registered as Apportionment Case No. 95 of 1935, in the Court of the President, Improvement Tribunal. After a protracted hearing, the President delivered his judgment on 31st August 1938. The award of the Collector was modified to this extent that the sum of Rs. 31,740 allowed jointly to the deity and the usufructuary mortgagees was given exclusively to the deity, the President being of opinion that the mortgagees could not prove that any amount was still due to them on the usufructuary mortgage bond. The award of the compensation money amounting to Rs. 1,58,000 in favour of the Bagarias as permanent lessees of the debattar property was not disturbed and the President also concurred with the Collector in holding that Hrishikesh Sen who was claimant No. 3 was not entitled to any compensation.

Two appeals have been taken to this Court

against this decision, one by the Bagarias as usufructuary mortgagees, which is Appeal From Original Decree No. 20 of 1939, while another appeal has been preferred by the next friend of the deity and has been registered as Appeal from Original Decree No. 173 of 1939. No appeal has been filed by Hrishikesh Sen whose claim was negatived both by the Collector as well as by the President of the Improvement Tribunal.

(Their Lordships then dealt with *Appeal No. 20 of 1939* and dismissed it.)

F. A. No. 173 of 1939. — We now come to the other appeal, viz., Appeal from Original Decree No. 173 of 1939, which has been filed by the next friend of the deity. The contention of the appellant in this appeal is that as the permanent leases under which the Bagarias purport to hold the Cotton Street premises are not binding on the deity as not being supported by any legal necessity, no compensation should have been allowed to them on that footing. The Bagarias, it is argued could at best rank as monthly tenants and get nominal compensation on that basis and the deity should not have been given merely the capitalised value of the rental. The learned President decided this point against the deity primarily on the ground that having regard to the provisions of Art. 134B, Limitation Act, it was no longer open to the next friend of the deity to question the validity of the permanent leases. He further held, though without discussing the evidence on the point, that the leases could be sustained on the ground of legal necessity. Both these points have been argued before us with elaborate fullness by the learned advocates on both sides and it is necessary that we should examine them carefully.

We will first turn to the question of legal necessity. The law on this point is well-settled, and

"it is a breach of duty on the part of a shebait, unless constrained thereto by unavoidable necessity, to grant a lease in perpetuity of debattar lands at a fixed rent, however, adequate that rent may be at the time of granting, by reason of the fact that by this means the debattar estate is deprived of the chance it would have, if the rents were variable, of deriving benefit from the enhancement in value in the future of the lands leased : " *vide* 44 I. A. 147¹ at page 156.

To determine whether any such necessity was proved in the present case it would be necessary first of all to refer to certain antecedent circumstances. The endowment in this case was created by one Siva Narayan Kalia, though no deed of dedication was executed by him.

1. ('17) 4 A. I. R. 1917 P. C. 33 : 39 I. C. 722 : 40 Mad. 709 : 44 I. A. 147 (P. C.), *Palaniappa Chetty v. Deivasikamony Pandara Sannadhi*.

a It was he who installed the deity in a brick-built house at Chinsurah and set apart certain properties consisting of putni taluks and garden lands at Chinsurah and Chandernagore for the worship of the idol. Siva Narayan had three wives besides a mistress by the name of Kishon Dasi. The first wife died during his life-time leaving a daughter Jiban Kumari. The second wife also predeceased her husband and the only issue she left behind her was a daughter named Amrit Kumari. The third wife whose name was Mooni Bibi survived Siva Narayan and she had no issue of her own. After the death of Siva Narayan there b was a solenama or deed of family arrangement executed in the year 1835 between Mooni Bibi, the surviving wife, Amrit Kumari and Jiban Kumari, the two daughters and Kisri Bibi, the mistress of Siva Narayan representing her minor son Ram Narayan Kalia, by which the entire properties left by Siva Narayan with the exception of those set apart for the deity were divided amongst them. Mooni Bibi got in her share among other properties a house at Tula Bazar in Calcutta which later on was numbered 140, Cotton Street, while to Jiban Kumari was allotted for her life-time the contiguous premises which subsequently became c 141, Cotton Street, the remainder after her death being given to the deity Iswar Gopal Jiew. The properties which Sibnarayan had set apart for the worship of the deity together with the house where the deity was located were expressly declared to be debattar properties and the duties of carrying on the worship of the deity were entrusted to Mooni Bibi and Jiban Kumari jointly. On 25th January 1848, Mooni Bibi executed an Arpannama (Ex. 10) by which she dedicated the Cotton Street premises which she got under the solenama mentioned above, to the deity Sri Gopal Jiew. The recitals in this document go to a show that the putni properties which belonged to the deity had been sold for arrears of rent and the fund for defraying the expenses of worship and other ceremonies of the deity had fallen short. Jiban Kumari, the daughter, it is recited, was making up the deficiency from her own private funds. As Mooni Bibi had no children of her own and the zemindari properties which she had in the district of Patna were sufficient for her maintenance she dedicated the Cotton Street property to the deity so that out of the monthly rental of this premises which was Rupees 20 a month, the sheba and other expenses of the deity might be properly performed. On 30th September 1869, Mooni Bibi created a permanent lease in her character as shebait in favour of Nehal Chand

Pandey who was a benamdar of Byrub Das Johuri and the kabuliyat executed by the lessee is marked Ex. L. The material portion of the document stands as follows :

"As you are shebait of the deity Sree Sree Iswar Gopal Jiew installed by your husband and as you have no other heir, you have executed in favour of Iswar Jiew an Arpannama (deed of dedication) in respect of the said house and are in possession thereof on payment of rent to Sadder and realisation of rent in mofussil. The said house collapsed in the rains of 1275 B. S. and being unable to bear the expenses of constructing a new building at the place and being, at the same time, desirous of preserving the property, you sold to me at the price of Rs. 500 the bricks and timbers, etc., of the said house which fell down, and have announced your intention to let out at permanent mokrari rent the land within the aforesaid boundaries, comprising an area of 2 cottas 9 chitaks 25 square feet as mentioned in the collectorate revenue bills of present times. Accordingly, I on appearing at your house at Chinsurah, Burrabazar, agree to pay a yearly rent of Rs. 300 at the rate of Rs. 25 per month and take settlement (of the land) at mokrari rent."

A few days later Jiban Kumari granted a permanent lease in respect of the other property, namely, premises 141, Cotton Street, and in which, as I have said already, she enjoyed a life interest under the terms of the solenama, the remainder being given to the deity. This lease was also executed by her in her capacity as shebait. It is recited in the kabuliyat Ex. K that the house stands in need g of repairs and for want of such repairs there is chance of some portion breaking down in the present year. It is for the purpose of repairing the property and keeping it in existence that the permanent lease was granted. Dr. Basak has argued quite properly that the recitals in these old documents could not be disregarded. As was held by their Lordships of the Judicial Committee in 43 I. A. 249,²

"where all the original parties to the transaction and all those who could have given evidence on the relevant points have grown old or passed away, a recital consistent with the probability and circumstances of the case assumes greater importance and cannot lightly be set aside."

At any rate, such recital could be regarded as evidence of representation made to the alienee, and h

"if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then, when proof of actual enquiry has become impossible, the recital coupled with such circumstances, would be sufficient evidence to support the deed."

The question in this case, however, is whether taking the recitals as they are, they do really make out a case of legal necessity. In the first document it is recited that the house had collapsed during the rains of 1875, and

2. (16) 3 A. I. R. 1916 P. C. 110; 36 I. C. 420 : 44 Cal. 186; 43 I. A. 249 (P.C.), *Banga Chandra Dhur Biswas v. Jagat Kishore Chowdhuri*.

a the shebait was incapable of building another house in its place and as she was desirous of preserving the property she was granting the permanent lease. In the other document it is simply stated that the house stood in need of repairs and as there was chance of its falling down if no repairs were made, the shebait desired to grant a permanent lease for repairing it and keeping it in existence. Preservation of the debattar property from extinction is undoubtedly a justifying necessity which would support a permanent alienation made by the shebait but it is absurd to speak of preserving a property which is itself the subject-matter of alienation. It seems to me that what the recitals really mean is that the lessor in one case was incapable of rebuilding the house and in the other case of making proper repairs which would prevent it from tumbling down. The result therefore was that none of the two houses would remain and there would exist only the vacant land which probably would not fetch any decent income. If in these circumstances the lessee undertook to rebuild one of the houses and keep the other in proper repairs and pay rent for them on the footing that they are house properties and not vacant lands, the deity would be benefited and would remain the owner of the houses although it might have no chance of getting khas possession of them at any time. Even if this was the intention of the parties that by itself would not make out a case of legal necessity unless it is proved that the income of these houses was absolutely necessary to maintain the endowment and that the endowment would materially suffer if the income of these houses was lost. Dr. Basak accepts this position as correct for no shebait is at liberty to alienate the property simply because that it might be of advantage or financial benefit to the deity. What he says is that after the loss of putni properties which the deity had, there was no other income-bearing property from the rents and profits of which the expenses of the debattar could be met. The recitals in Mooni Bibi's Arpannama (Ex. 10) would show that the income of the existing debattar property at that time was not sufficient to meet the expenses of jatra, mahotsab, etc., which were usually performed and Jiban Kumari had been meeting this deficiency from her own funds. Mooni Bibi dedicated premises No. 140 Cotton Street for the obvious reason that deity might have some permanent income every month from which its legitimate expenses could be met. As the house dedicated by her collapsed during the rains of 1875 and she was not in a

position to build another house in its place the only thing she could do was to let out the land which measured only 2 cottas and odd chittaks as vacant land. This could not fetch any appreciable income and would not satisfy the requirements of the deity. The other alternative was to sell the vacant land and if the circumstances justified a sale, a permanent lease would also be justified, for it is not disputed that the rent reserved by the lease was quite adequate having regard to the market value of the land at that time.

There is undoubtedly some force in this contention though I must say that there are good many assumptions involved in this argument about which there is no direct evidence. The recitals in the Arpannama undoubtedly show that the putni properties of the deity were lost and that in meeting the expenses of jatra, mahotsab etc. Jiban Kumari had been making contributions from her own funds. We do not know what was the amount of money which the deity required for its normal expenses and we do not also know the amount of contribution that had to be made by Jiban Kumari. If it can be shown that the worship of the deity could not be carried on properly without the income of these two houses and as the income was sure to be reduced considerably if the houses had collapsed leaving nothing but the bare land, possibly a justifying necessity could be found for granting the permanent leases but as to that, as I have said already, no direct evidence is available.

One thing undoubtedly is in favour of Dr. Basak's client, namely, that the validity of these permanent leases has not been questioned for a long period of time extending for over half a century, and although three shebaites have succeeded to the debattar estate one after another since the death of Mooni Bibi and Jiban Kumari, none of them impeached the propriety of the leases. It is not disputed that the land values in Calcutta had gone up considerably during this period, and obviously, if the leases could be successfully challenged it would have meant a large income for the debattar estate. It appears from the records that Mooni Bibi died in 1870 and Jiban Kumari followed her in 1872. Before her death Jiban Kumari had appointed Gour Moni Devi, daughter of her step-sister Amrit Kumari as shebait of the debattar property (*vide* Ex. 11). By a deed of assignment executed in 1873, the rents reserved by the two permanent leases referred to above were assigned by Gour Moni to one Purna Chandra Boral in order to repay certain advances made by the latter (*vide* Ex. Y), and in this deed of assignment

the mokrari pottas are expressly referred to. After Gour Moni, Gopal Das became the shebait of the deity and he lived till 1900 and during all these years no effort was made either by himself or by his guardian to recover possession of these properties included in the leases. After the death of Gopal Das, Annapurna became the shebait and the debattar estate, as I have said already, has been since 1896 under the management and control of the usufructuary mortgagee and his successors, and they were the persons in possession when the declaration under the Land Acquisition Act was made.

The Madras High Court held in 19 Mad. 485³ that although a manager for the time being has no power to make a permanent alienation of a temple property in the absence of proved necessity for the alienation, yet the long lapse of time between the alienation and the challenge of its validity is a circumstance which entitles the Court to assume that the original grant was made in exercise of that extended power. This principle was approved of and acted upon by their Lordships of the Judicial Committee in 49 I. A. 54.⁴ In the case before us the recitals in the document are certainly ambiguous. But regard being had to the long lapse of time between the date of the leases and that of the present proceedings and the conduct of successive shebait, it would not be wrong, I think, to make a presumption in favour of the lessee. On the whole, therefore, I am inclined to hold that the leases were for legal necessity.

But even if I assume for the sake of argument that there is no necessity to justify the permanent leases, I think that the Court below is right in holding that Art. 134B, Limitation Act, would afford a complete protection to the lessees in the present case. This article was introduced into the Limitation Act along with Art. 134A and 134C by the amending Act 1 of 1929 which also added a new paragraph to S. 10, Limitation Act. It is well known that there was considerable diversity of judicial opinion in India on the question of limitation in respect to suits for recovery of endowed property improperly alienated by a manager prior to the pronouncement of the Judicial Committee in 48 I. A. 302.⁵ The prevailing view seemed to be

3. ('96) 19 Mad. 485 : 6 M.L.J. 247, Chockalingam Pillai v. Mayandi Chettiar.

4. ('22) 9 A.L.R. 1922 P. C. 163 : 66 I. C. 162 : 49 I. A. 54 : 46 Bom. 481 (P.C.), Bawa Magniram Sitaram v. Kasturbhai Manibhai.

5. ('22) 9 A.L.R. 1922 P. C. 123 : 65 I. C. 161 : 48 I. A. 302 : 44 Mad. 831 (P. C.), Vidya Varuthi Thirtha Swamikal v. Balusam Ayyar.

that when a mohunt or shebait transferred a property belonging to a math or idol to a stranger, the period of limitation would begin to run from the date of the alienation and not from the date on which the succeeding mohunt or shebait came into office. Reference may be made in this connexion to the cases in 23 Cal. 536,⁶ 27 Bom. 363,⁷ 27 Bom. 373,⁸ 20 ALL. 482.⁹ The majority of the decisions proceeded on the view that the person who alienated the endowed property was in the position of a trustee and consequently the case was governed by Art. 134, Limitation Act, as it then stood, and time ran from the date of transfer. In some of the cases, however, Art. 144 was applied. Thus in 23 Cal. 536,⁶ Banerjee J. observed as follows :

"The idol is a judicial person capable of holding property as has been authoritatively settled by the decision of the Privy Council in 13 M. I. A. 270,¹⁰ and the possession of the defendants who profess to derive title, not from the idol, but ignoring its rights must be taken to have become adverse to the idol from the dates of the two alienations which are both more than 12 years before the date of the present suit."

On the other hand, there are certain cases, though few in number which adopted the view that a mohunt who had at best a life interest in the property, could not create any interest superior to his own, and an alienee from the mohunt could only take interest commensurate with the mohunt's life, and if he remained in possession after the death of the mohunt, the successor would have a cause of action from the date of election : *vide* 20 W. R. 471.¹¹ In 48 I. A. 302,⁵ their Lordships of the Judicial Committee definitely laid down that Art. 134 has no application to cases of this description. It was said that neither under the Hindu law nor in the Mahomedan system is any property conveyed to a shebait or mutwalli in the case of dedication, nor is any property vested in him. Whatever property the shebait or mohunt holds for the idol or the institution he holds as manager with certain beneficiary rights which are regulated by custom or usage. Alienation by shebait or mohunt cannot therefore be treated as an act of a trustee

6. ('96) 23 Cal. 536, Nilmony Singh v. Jagabandhu Roy.

7. ('03) 27 Bom. 363 : 4 Bom. L. R. 743, Dattagiri v. Dattatraya.

8. ('03) 27 Bom. 373 : 5 Bom. L. R. 241, Narayan v. Shri Ram Chandra.

9. ('98) 20 All. 482 : 1898 A. W. N. 123 (F. B.), Behari Lal v. Muhammad Muttaki.

10. ('70) 13 M. I. A. 270 : 13 W. R. 18 : 2 Suther 300 : 2 Sar. 528 (P. C.), Shibessuree Dabia v. Mathoora Nath.

11. ('69) 20 W. R. 471, Mohunt Burm Suroop Dass v. Khashee Jha.

a to whom property has been conveyed in trust within the meaning of Art. 134, Limitation Act. As Art. 134 has no application, such cases fall within the residuary Art. 144 and the question arises as to when does the possession of the alienee become adverse to the endowment. It was held by their Lordships of the Judicial Committee that the possession did not become adverse during the lifetime of the alienating mohunt as he was competent to create an interest commensurate with his life. On his death the possession of the alienee would become adverse, but if the alienation was by way of lease and the lessee's possession was consented to by the succeeding manager, there would be no adverse possession till the succeeding mohunt died.

In 48 I. A. 302,⁵ the alienation was by way of a permanent lease. The Privy Council, however made it clear in 60 I. A. 124,¹² that the same principle applies to sale of an item of debattar property and the possession of the purchaser would not become adverse so as to cause time to run under Art. 144, Limitation Act, until the alienating mohunt ceased to be a mohunt by death, removal or otherwise. Distinction was made with regard to the class of cases where there was an assignment or disposition of an entire math and its properties and not of particular items only; and in such cases the alienation being void altogether, the possession of the assignee would become adverse from the very date of assignment. It was pointed out that the cases in 27 I. A. 69,¹³ 37 I. A. 147,¹⁴ were cases of this type to which the principle enunciated in 48 I. A. 302⁵ was inapplicable. Article 134B, Limitation Act, came into force on 1st January 1929. It prescribes a limitation of 12 years for a suit instituted by the manager of a Hindu, Mahomedan or Buddhist endowment for recovery of possession of immovable property comprised in the endowment which was transferred by a previous manager for consideration. Such cases are no longer governed by Art. 144 but come under the specific Art. 134B and the terminus a quo is the date of death, resignation or removal of the transferor. Thus, the Legislature, in a sense, has adopted the principle which the Judicial Committee enunciated in 48 I. A. 302,⁵ though it

is no longer necessary to enquire when the alienee's possession became adverse.

In the case before us both the alienating shebait died long before 12 years prior to the starting of the land acquisition proceedings. If Art. 134B applies to this case, it cannot be disputed that at the date when the declaration for acquisition was published it was no longer possible for a shebait of the deity to institute a suit for recovery of possession of the properties comprised in the permanent leases on the ground that the leases were not binding on the deity. The necessary consequence, therefore, would be that the alienee who obtained possession under the transfers would acquire under S. 28, Limitation Act, a title to the properties.

Mr. Ghose appearing on behalf of the next friend of the deity has contended before us that Art. 134B has no application to the facts of the present case. His argument on this point is of a two-fold character. His first contention is that Art. 134B read with S. 28, Limitation Act, might extinguish the right in a case when it is possible to, or necessary for the succeeding shebait to institute a suit for recovery of possession of a debattar property alienated by his predecessor; but, when, as in the case before us, the succeeding shebait by adopting the lease created new tenancies, each during his term of office, and it was not possible for them to institute a suit for possession, Art. 134B cannot have any application. If I have understood Mr. Ghose aright, what he means to say is this : Art. 134B, Limitation Act, is confined to cases where the succeeding shebait does not recognise the lease and consequently the possession of the lessee becomes adverse to him. If the succeeding manager consents to the lessee's continuing in possession, a new tenancy commensurate with his term of office may be presumed, and no right to recover possession accrues till a shebait comes who repudiates the lease. I will assume for purposes of this case that the contention of Mr. Ghose is right, though it seems to me that under Art. 134B, Limitation Act, the terminus a quo has been rigidly fixed and begins from the date of death or cessation of office of the alienating mohunt and the Legislature has deliberately avoided all questions of adverse possession after the death of such manager. By assuming that the contention of Mr. Ghose is right, what would be the position in the present case when none of the shebait who succeeded to the debattar estate after the death of Jiban Kumari chose to impeach the validity of these leases? It is during the continuance of the present proceed-

12. ('33) 20 A.I.R. 1933 P. C. 75 : 142 I. C. 214 : 60 I. A. 124 : 12 Pat. 251 (P. C.), *Ram Charan Das v. Naurangi Lal*.

13. (1900) 23 Mad. 271 : 27 I. A. 69 : 10 M. L. J. 29 : 7 Sar. 671 (P. C.), *Gnanasambanda Pandara Sannadhi v. Velu Pandaram*.

14. ('10) 37 Cal. 885 : 7 I. C. 240 : 37 I. A. 147 : 14 C. W. N. 889 : 12 C. L. J. 110 (P.C.), *Damodar Das v. Lakhan Das*.

ings that the deity has challenged the legality of these transfers. If Mr. Ghose is right, we have got to hold that no cause of action for instituting a suit to recover possession of the idol's property within the meaning of Art. 134B, Limitation Act, accrued before 1935 when the land acquisition proceedings were started. But even though the cause of action accrued in 1935 and not earlier than that, it would be still incapable of being enforced on that date by reason of Art. 134B, Limitation Act, as more than 12 years already elapsed from the death of the two alienating managers.

Mr. Ghose next argues that Art. 134B cannot apply to a case like the present when the period of 12 years had already elapsed before this article came into force. What he says is that a statute of limitation cannot extinguish a substantive right which was in existence at the date when the statute was passed. The Legislature can shorten the period within which a suit for enforcement of such right can be brought but when it is not possible to bring a suit at all, to give effect to the statute of limitation would be to take away a vested right. In such circumstances the law of limitation would not apply. Reliance has been placed in support of this proposition upon a Special Bench decision of this Court in 41 Cal. 1125.¹⁶ The general principle undoubtedly is that the law of limitation applicable to a suit is the law in force at the date when such suit is instituted. If, however, the result of applying such law of limitation is to take away a vested right, such intention could not be imputed to the Legislature unless it is expressed in unequivocal language. It is also well established that a right of suit is a vested right. In the case decided by the Special Bench the cause of action had already accrued prior to the passing of the Amending Act. Under the law of limitation as it then stood, the plaintiff had 12 years' time within which to institute a suit. The Amending Act substituted two years for 12 years, and the suit was instituted more than two years after the cause of action arose but within 12 years from that date. It was held that the vested right of suit which the plaintiff had under the old law could not be taken away by the Amending Act unless there was express provision to that effect. In the case before us, it must be held that under the law as it stood prior to the introduction of Art. 134B in the Limitation Act, a suit of this description would be governed by Art. 144 of the Act and the period of limitation would be 12 years from the date when the defendant's possession became adverse. According to the rule laid down in 48 I.A. 302⁶ the possession of the lessee would not be adverse so long as the shebait who granted the lease was holding his office. After his death, resignation or removal, the possession of the lessee would be presumably adverse but it would be open to the succeeding mohunt to accept the lease and in that case possession would not become adverse unless a shebait comes into office who does not recognise the lease as binding. In the case before us, it is admitted that the possession of the lessee was not adverse prior to 1929 when Art. 134B was introduced. No right to sue accrued to the manager of the deity prior to the passing of the Amending Act 1 of 1929 and there is no question of taking away any right accrued prior to the passing of the Amending Act. The identical view has been taken by a Division Bench of this Court in 41 C.W.N. 693,¹⁶ and I see no reason to differ from that decision.

Mr. Ghose also argued, though somewhat faintly, that Art. 134B bars the right of the manager but not of the deity. To that the obvious reply is that the right to sue is vested in the manager and not in the deity : *vide* 31 I. A. 203.¹⁷ The result, therefore, is that this appeal is dismissed. The cross-objection is dismissed. We make no order as to costs.

Sen J.—I agree.

G.N.

Appeal dismissed.

16. ('37) 24 A. I. R. 1937 Cal. 305 : 172 I.C. 315 : I.L.R. (1937) 2 Cal. 242 : 41 C.W.N. 693, Raghu Nath Jiu v. Ganga Gobinda Pati.

17. ('05) 32 Cal. 129 : 31 I.A. 203 : 8 C.W.N. 809 : 8 Sar. 698 (P. C.), Maharaja Jagadindra Nath Roy Bahadur v. Rani Hemanta Kumari Debi.

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R. C. MITTER AND BLANK JJ.

Pulin Behari Tewari and others — h
Appellants

v.

Ram Ranjan Hati and others —

Respondents.

Appeals Nos. 59 and 95 of 1940, Decided on 15th December 1943, from original decrees of Sub-Judge Birbhum at Suri, D/- 18th December 1939.

(a) Landlord and tenant — Assignee of lease — Liability for rent to landlord is due to privity of estate and it ceases as soon as privity ceases.

An assignee of a leasehold interest is liable to pay rent to the landlord only on the ground of privity of estate : ('39) 26 A. I. R. 1939 P.C. 14 and ('41) 28 A.I.R. 1941 P.C. 36, *Referred*. [P 221h]

So the liability of an assignee to pay rent would continue only up to the time that the privity of estate ceases to exist. [P 221h]

15. ('14) 1 A. I. R. 1914 Cal. 806 : 24 I. C. 37 : 41 Cal. 1125 : 19 C.L.J. 549 : 18 C.W.N. 804 (F.B.), Gopeshwar Pal v. Jiban Chandra Chandra.

- a (b) Bengal Patni Regulation (8 of 1819), Ss. 5 and 6 — Part of patni transferred by its owner—Liability of part owner for rent ceases from date of transfer of his interest.

In the case of the sale of the whole patni the transfer is complete as soon as the deed of transfer is registered but the transferor remains liable to pay rent till the transferee pays the landlord's fee and offers security and his security is accepted. The transferor thus remains liable to pay rent for a time, i.e., from the date of the transfer till the landlord's fee is paid and security furnished by the transferee after the privity of estate between him and the zemindar had ceased. The position is the same where the whole patni is sold in execution of a decree, except that in the case of a sale for arrears of patni rent, the purchaser is not under an obligation to pay the fee only.

- b But in the case of sales of portions of the patni the liability of the part owner of the patni to pay rent would cease from the date of transfer by which he parts with his entire interest in the patni : 26 Cal. 103, *Disting.*; 1901 A.C. 495; 13 M.I.A. 160 (P. C.) and ('43) 30 A.I.R. 1943 Cal. 319, *Ref.*

[P 222b,c,e,f,h]

- (c) Bengal Patni Regulation (8 of 1819), Ss. 5 and 6—Compromise between zamindar and part owner separating his rent—Other part owners not parties to compromise — Patni is not split up—Such part owner cannot however be personally liable for rent of other part owners.

- c A tenure can be split up only by the consent of all the landlords and all the tenants. Where therefore the landlord enters into a compromise with a part owner of a patni recognising that part owner as a patnidar of his share on a separated rent, the patni tenure is not split up as the other part owners had not joined in the compromise. The effect of the compromise decree, however, is that the zemindar cannot hold the part owner personally liable for rent and cesses payable in the share of the other patnidars.

[P 223f,g]

Ramaprosad Mookerjee and Jagadish Chandra Ghose (in 59) and Baidyanath Banerjee and Chandra Narain Laik (in 95) —

for Appellants.

Bankim Chandra Mukherjee, Gopendranath Das, Hariprosanna Mukherjee, Baidyanath Banerjee, Muktipada Chatterjee, Smriti Kumar Roy Chaudhury, Asoke Nath Roy, Kalyan Ananda Mitter and Syed Farhat Ali (for Deputy Registrar in 95) —

for Respondents.

- d **Judgment.** — Lot Rosowa appertains to Touzi No. 111 of Beerbhoom Collectorate. The past proprietors of the said touzi settled the same in patni taluk to one Shibchandra Chakravarty at an annual rent of Rs. 7623-5-8. The patnidar was to pay the revenue of the touzi (Rs. 4173-14 annas) by barat and the balance of the patni rent as munafa to the proprietor of the said touzi. The plaintiffs purchased 5 as. 19 gundas 3 karas odd share of that touzi at a revenue sale.

In 1935 they brought a rent suit, Rent Suit No. 24 of 1935, against a large number of persons for recovery of the arrears of rents due in their share for the years 1339-1341. We call those defendants, for brevity's sake, the

Mitters, the Tewaris, the shebaitis, the Kabirajes and the trustees of the Jagadamba Estate. It is admitted by the parties, that the Kabirajes had at that time 10 annas share of the patni and were liable as between them and the other patnidars for that share of rent for the period for which rent was claimed in that suit. In that suit the plaintiffs prayed for a joint decree against all the defendants. The Kabiraj defendants, however, pleaded that their liability for rent had been separated and that the plaintiffs could obtain a decree against them only for 10 annas share of the rent claimed in the suit. This defence was overruled by the trial Court, which passed a decree for the whole amount claimed by the plaintiffs against the Kabiraj defendants and the other defendants. The Kabiraj defendants preferred a first appeal to this Court, being No. 136 of 1936. The respondents were the plaintiffs and the other defendants to the said rent suit. The appellants in that appeal, namely, the Kabiraj defendants, and the plaintiffs-respondents filed a petition of compromise in this Court. That compromise was recorded and a decree was passed in terms thereof. The appeal was dismissed as against the other respondents—the defendants-respondents — who had not joined in the compromise. The material terms of the compromise were : (i) that on receipt of a selami of Rs. 700 the plaintiffs recognised the Kabiraj defendants as their patnidars at the apportioned rent of Rs. 1784-4-11 per year plus cess Rs. 154-4-9, (as being the rent and cesses payable in respect of 10 annas share which they had in the patni); (ii) that this apportionment was to come into effect from 1342 B.S., (iii) that the plaintiffs will not be entitled to make the Kabiraj defendants liable for the rent and cesses of the patni payable in the share of the co-patnidars of the Kabiraj defendants from 1342, and (iv) that out of the apportioned rent of Rs. 1784-4-11 plus cesses, Rs. 154-4-9, the Kabiraj defendants will pay Rs. 976-12-11 as revenue in the Collectorate to the credit of the plaintiffs as per kists of revenue and pay the balance of Rupees 807-8-0 plus cesses, Rs. 154-4-9, as munafa to the plaintiffs according to kists and also interest as mentioned in the patni kabuliat.

One Banku Behary who had 1 anna 6 pies share in the patni had mortgaged his patni interest twice. The first mortgagee was Nistarini Debi and the second mortgagees were the Tewaris. The Tewaris brought a suit against their mortgagor and obtained a decree in execution of which they purchased Banku Behari's 1 anna 6 pies share in the patni and

a obtained delivery of possession. In their character as part purchasers of the patni they were impleaded as parties defendants in Rent Suit No. 24 of 1935. The plaintiffs in that suit got a rent decree against them along with others. On 14th August 1935, which corresponds to some day in Vadra 1340, they sold their patni interest to two ladies, Mankumari and Gouribala. That may or may not be a benami transaction but that fact is not material. We simply recite the same to give a connected history. The material fact, however, is that Nistarini brought a suit, Title Suit No. 6 of 1934, to enforce her mortgage. b In that suit she impleaded her mortgagor as also the puisne mortgagees—the Tewaris—as parties defendants. She obtained a decree and in execution thereof purchased on 2nd January 1935 (=18th Pous 1341) the mortgaged premises, which as we have already stated, was 1 anna 6 pies share of the patni. The interest of the Tewaris thus came to an end on that date. The sale was confirmed on 22nd March 1935 (Chaitra 1341) and she obtained delivery of possession on 9th April 1935. She has not, however, been recognised as a tenant by the plaintiffs.

c On 18th April 1939 the plaintiffs instituted the suit (Rent Suit No. 1 of 1939) in which this appeal arises. They claim their share of the rent of the patni for the years 1342 to 1345. Defendants 1 to 16 are the Mitters and defendant 17 is Jotindra Mohan Ukil. They have no interest in the patni and have been impleaded on the ground that they were past patnidars. Of them defendants 4 to 6 are the heirs of Banku Behary. Defendants 18 series are the shebaitis of a deity, Iswar Madhusudan Jieu Thakur. The deity has 2 as. 6 pies share in the patni. Defendants 22 to 27 are the Tewaris. They have no interest in the patni, their interest having passed by the court sale to d Nistarini Debi before the period in claim. The Kabirajes are defendants 28 to 42. They have 10 annas share in the patni. The trustees of Jagadamba Trust Estate, who are co-plaintiffs in their character as part proprietors of the tauzi, are the owners of the remaining 2 annas share of the patni.

The plaintiffs proceed firstly on the basis that 10 annas of the patni which belong to the Kabirajes had become a separate unit by reason of the compromise decree passed in First Appeal No. 136 of 1936. They accordingly pray for a decree for rent for the remaining share against defendants 1 to 27. They, however, state in the plaint that if the patni be held not to have been split up into two by reason of that compromise decree, then a decree may

be passed for the whole of the arrears for e 1942-1945, against all the defendants, that is, against defendants 1 to 42.

Two sets of written statements are material for this appeal. One has been filed by the Tewaris and the other by the Kabirajes. In their written statement, the Tewaris pleaded that they were not liable to pay any portion of the rent claimed as they had no interest in the patni during the period in suit. The Kabirajes objected to the alternative claim and pleaded that they were separately liable for 10 annas share of the rent on the ground that their share had been separated and was formed into a distinct tenure by reason of the f compromise effected in the High Court in First Appeal No. 136 of 1936. The learned Subordinate Judge has overruled the defences of both the Tewaris and the Kabirajes and has passed a decree for the whole of the plaintiffs' claim against all the defendants, including the Tewaris and Kabiraj defendants. Two appeals have been preferred before us against his decree—one No. 59 of 1940—by the Tewaris, and the other, No. 95 of 1940, by the Kabirajes. We will first deal with the appeal filed by the Tewaris. Therein they raise two points: (i) that they are not liable as their interest in the patni had ceased before the period in claim, g and (ii) that interest cannot be awarded at more than 6½ per cent.

We have already mentioned the fact that they had 1 anna 6 pies share in the patni but they ceased to have any interest in the patni at least from 2nd January 1935, when Nistarini purchased that share of the patni in execution of her mortgage decree. That date corresponds to 18th Pous 1341. The claim in suit is from 1342. On general principles the Tewaris would not be liable for the right of the landlords to get rent rests on two foundations, either privity of contract or privity of estate: 53 Cal. 197.¹ An assignee of a leasehold interest is liable to pay rent to the landlord only on the ground of privity of estate: 66 I.A. 50;² 68 I.A. 67.³ So the liability of an assignee to pay rent would continue only up to the time that the privity of estate ceases to exist. Admittedly the Tewaris never entered into any contract h

1. ('25) 12 A.I.R. 1925 Cal. 1056 : 90 I.C. 211 : 53 Cal. 197 : 42 C. L. J. 232 : 29 C.W.N. 1000 (F.B.), Jagan Mohan Sarkar v. Brojendra Kumar.

2. ('39) 26 A.I.R. 1939 P.C. 14 : 179 I.C. 328 : I.L.R. (1939) 1 Cal. 283 : 66 I.A. 50 : I.L.R. (1939) Kar. P. C. 78 (P. C.), Ram Kinkar Banerjee v. Satyacharan.

3. ('41) 28 A.I.R. 1941 P.C. 36 : 193 I. C. 890 : 20 Pat. 521 : I.L.R. (1941) Kar. P. C. 66 : 68 I.A. 67 (P. C.), Jagadamba Loan Co. Ltd. v. Raja Shiba Prosad Singh.

a with the plaintiffs or their predecessors-in-interest to pay rent. They cannot therefore be liable on the basis of a covenant to pay rent nor on the ground of privity of estate as privity of estate ceased when their share in the patni was sold away to Nistarini. The question however is whether there is any provision in the patni regulation which either expressly or by necessary implication affects or modifies those general principles, and if so to what extent. The sections of the patni regulation bearing upon this question are Ss. 5 and 6.

In the case of the sale of the whole patni the law is settled. The transfer is complete as soon as the deed of transfer is registered but the transferor remains liable to pay rent till the transferee pays the landlord's fee and offers security and his security is accepted. If the zemindar refuses to accept the security offered the transferee has his remedy. He can appeal to the civil Court and if he satisfies the Court as to the sufficiency of the security the zemindar is placed under an obligation to accept it and to give effect to the transfer. The doctrine that liability to pay rent depends upon privity of estate has thus been modified to some extent, inasmuch as the liability of the transferor to pay rent does not cease from the date of transfer but continues till the transferee fulfils the requirements of S. 5, though the title to patni had passed on the registration of the conveyance to the transferee from the date of the transfer: 54 Cal. 1064,⁴ 33 C.W.N. 186.⁵ He thus remains liable to pay rent for a time, i. e., from the date of the transfer till the landlord's fee is paid and security furnished by the transferee, after the privity of estate between him and the zemindar had ceased. The position is the same where the whole patni is sold in execution of a decree, except that in the case of a sale for arrears of patni rent, the purchaser is not under an obligation to pay the fee only.

We will however have to examine the position where the sale, either voluntary or in invitum, is only of a share in the patni. The transfer passes title to the purchaser, but the purchaser is not under an obligation to pay the fee to the zemindar or to offer security. He cannot compel the zemindar to recognise him as one of the patnidars. Sections 5 and 6 of the Regulation are inapplicable. He can offer the zemindar fees or offer security, but those acts on his part can at best serve as

inducements to the zemindar to recognise him as his tenant. He cannot compel recognition. The position of the purchaser of a part of the patni thus differs materially from the position of the purchaser of the entire patni. These propositions have been laid down in a series of cases beginning with 13 M. I. A. 160⁶ and ending with 47 C.W.N. 186.⁷ This difference in our judgment is an important factor to be taken into consideration in determining the question which we have to decide in this appeal.

In the case of a sale of the whole patni, though the liability of the transferor to pay rent may continue for a time after the privity of estate between him and the zemindar had ceased that liability can be put an end to against the will of the zamindar by the transferee paying the landlord's fee, where such fee is payable, and giving security or by compelling the zamindar to accept the security offered through the intervention of the civil Court, where the zamindar had improperly refused to accept it. In the case of a sale of a part of the patni that process is not open to the transferee. It would lead to manifest hardship if we were to hold that the liability to pay patni rent on the part of the transferor would still continue, although he had parted with all his interest in the patni, for it would then be entirely within the power of the zemindar to hold him and his heirs liable for rent forever according to his sweet will throughout the long course of successive transfers by simply withholding recognition of each of the successive transferees. The general doctrine that liability to pay rent (leaving aside the cases of privity of contract, which does not arise in the case before us) depends upon privity of estate has been affected to a certain extent only by the provision of S. 5, Patni Regulation and when that section is made inapplicable by the last paragraph of S. 6 to transfers of a portion of the patni, the reason for continuing the liability of the transferor, who had only a share in the patni, after he had parted with his whole interest, disappears. We would accordingly hold that in the case of sales of portions of the patni the liability of the part owner of the patni to pay rent would cease from the date of transfer by which he parts with his entire interest in the patni, unless we are tied down by any decision binding on us. The learned advocate

4. ('28) 15 A.I.R. 1928 Cal. 94 : 107 I.C. 357 : 54 Cal. 1064, Krishna Chandra v. Dinanath Biswas.

5. ('29) 16 A.I.R. 1929 Cal. 108 : 114 I.C. 150 : 56 Cal. 524 : 48 C.L.J. 392 : 33 C.W.N. 186, Tinkari Mukherjee v. Mahima Niranjan Chakravarti.

6. ('69) 13 M.I.A. 160 : 12 W.R. 43 : 3 Beng.L.R. 48 : 2 Suther 269 : 2 Sar. 500 (P. C.), Robert Watson and Co. v. Collector of Zillah Rajshahye.
7. ('43) 30 A. I. R. 1943 Cal. 319 : 208 I. C. 309 : I.L.R. (1943) 1 Cal. 274 : 47 C.W.N. 186 : 76 C.L.J. 83, Jatis Chandra Pal v. Khirode Kumar.

a appearing for the plaintiffs-respondents contends that there is a decision of a Division Bench which has taken a view contrary to the view which we have expressed above and we have no option but to follow it or if we differ from it to refer the matter to a Full Bench. The decision that he cites is 26 Cal. 103.⁸ In our judgment that case did not decide the point which we have before us, and so far as we are aware the question raised before us is of first impression.

b A patni or portion of a patni is transferable property. The zamindar has the option of recognising the transferee of a part as his tenant. When he does recognise him, and he does so by either demanding rent from him or suing him for rent, he has the right to get rent from the transferor and transferee jointly. This is the proposition that has been laid down in 26 Cal. 103.⁸ The facts of that case, however, must be examined closely and the observations of the learned Judges must be read in the light of the facts of that case, (1901 A. C. 495.⁹) There the patni had been created in 1843. It passed by successive transfers to one Rakhal Das Mukherjee and then by inheritance to Sarat Moni Devi, who was defendant 1 in that suit. Before 1301 B. S. c defendant 1 sold 8 annas of the patni to defendant 3, Sourendra Mohan Tagore. The suit for rent was for 1301 B. S., when defendants 1 and 3 were admittedly the patnidars, each having 8 annas share in the patni. The further fact, however, was that defendant 3's name had not up to that time been registered in the office of the zamindar. In Kartick 1302 defendant 3 made a gift of his 8 annas share in the patni to one Danesh Prokash Ganguly. All that was decided in that case was that the zamindar could make defendant 3 jointly liable with defendant 1 for the rent of 1301. In that year there was admittedly privity of estate d between the zamindar and defendant 3, for the transfer of a fractional share of a patni is not void. The question which we have to decide would have arisen in that case if the zamindar had sought to make Sourendra Mohan Tagore liable for rent for a period after he had made the gift of his share of the patni to Danesh Prokash Ganguly. We are therefore not faced by any precedent binding on us. We accordingly hold that the Tewaris are not under the liability to pay rent for the period in claim, as they were part owners of

the patni and the entire interest they had in e patni had ceased before the period in claim.

In the view we have taken it is not necessary to decide the second point raised by their advocate. We may however point out that the learned Subordinate Judge has not awarded interest but damages at the rate of 12½ per cent.

F. A. No. 95 of 1940.—This appeal is by the Kabirajes and the only point in it is whether the learned Subordinate Judge was right in passing a decree against them jointly with the other defendants on the alternative claim of the plaintiffs. The point depends upon the effect of the compromise decree passed by this Court in First Appeal No. 136 of 1936. We have already recited the material terms thereof. There cannot be any doubt that the patni tenure was not split up into two as a result of that compromise, as the persons who had then an interest in the patni, other than the Kabirajes, had not joined in that compromise. A tenure can be split up only by the consent of all the landlords and all the tenants. The Kabirajes accordingly cannot take up the position that the zamindar should have sued them separately for the amount due from them on the basis that they had a separate patni at an annual rental of Rs. 1784-4-11 pies. The plaintiffs were therefore competent to maintain the alternative claim. The effect of the compromise decree, however, is that the plaintiffs cannot hold them personally liable for rent and cesses payable in the share of the other patnidars. The learned Subordinate Judge has not made this reservation in his decree. That ought to be done. The decree of the learned Subordinate Judge is accordingly modified in their favour to that extent.

The result is that Appeal No. 59 of 1940 succeeds in full and No. 95 of 1940 in part. The suit against the Tewaris (defendants 22 to 27) is dismissed with proportionate costs h to those defendants. The decree as made by the learned Subordinate Judge as against the other defendants must stand with a proviso added to the effect that "the personal liability of the Kabiraj defendants (28 to 42) would only be for the sum of Rs. 961-12-9 plus 12½ per cent. damages thereon plus costs calculated on the sum of Rs. 961-12-9.

The appellants in Appeal No. 59 of 1940, will also get the costs of this Court from the plaintiffs-respondents hearing-fee being assessed at 10 Gold Mohurs. In Appeal No. 95 of 1940 the parties would bear their respective costs in this Court. Let a self-contained decree be drawn up in this Court.

R.K.

Order accordingly.

8. ('99) 26 Cal. 103 : 3 C. W. N. 38, Sourendra Mohan Tagore v. Sarnomoyi.

9. (1901) 1901 A. C. 495 : 70 L. J. P. C. 76 : 85 L. T. 289; 50 W. R. 139; 17 T. L. R. 749; 65 J. P. 708, Quinn v. Leatham.

a **A. I. R. (31) 1944 Calcutta 224**

LODGE AND DAS JJ.

Becharam Mukherji — Appellant

v.

Emperor and another — Respondents.

Criminal Admitted Appeal No. 617 of 1942, Decided on 23rd June 1943.

(a) Criminal trial — Theft — Charge—Whole lot of things stolen during definite period — Thefts of different things on different dates separated by considerable periods cannot be treated as one theft — Each theft is substantive offence and should be charged separately.

Thefts of different things on different dates separated by considerable periods cannot be treated as one theft on the analogy of successive blows constituting one assault. The analogy cannot apply where the prosecution cannot detect which particular thing was stolen on which particular date, a whole lot of things having been stolen during a definite space or period of time, although the total number of things stolen and the dates between which the several thefts took place can be enumerated. Each of these alleged thefts is a complete offence by itself and cannot be lumped up together. Each theft is a substantive offence and should be charged separately with reference to particular things alleged to have been stolen. [P 227a,b]

Cr. P. C. —

('41) Chitaley, S. 233, N. 3 Pt. 5.

('41) Mitra, Page 803, N. 745.

Penal Code —

('40) Ratanlal, Page 944, Note "Single or several thefts."

c (b) Criminal P. C. (1898), Ss. 233, 234, 235, 236, 239 and 537 — Accused charged with three offences of theft and three offences of dishonest misappropriation in alternative—All six offences tried at one and same trial — Joinder of charges held illegal and not curable under section 537.

The accused taking advantage of the helpless condition of the complainant induced her to deposit her moneys in two banks and her ornaments in a third bank and contrived to get accounts opened in the joint names of himself and the complainant and robbed the complainant by withdrawing the moneys and the ornaments from the banks on various dates. The accused was charged with three offences of theft in respect of the three items deposited with the three banks and three offences of dishonest misappropriation in the alternative. All these six offences were tried at one and the same trial :

Held that the joinder of charges was not permissible under the general rule contained in the first part of S. 233 nor was such a course permissible under any of the exceptions contained in Ss. 234, 235, 236 and 239 and as such the illegality could not be cured by S. 537, Criminal P. C. [P 227f,g; P 228f]

Cr. P. C. —

('41) Chitaley, S. 235, N. 2 Pt. 25 ; S. 233, N. 5 Pts. 1 and 2.

('41) Mitra, Page 825, N. 758; Page 806, N. 748; Note "Effect of misjoinder of charges."

(c) Criminal P. C. (1898), S. 235 (1)—Whether series of acts form same transaction is purely question of fact.

Whether a series of acts are so connected together as to form the same transaction is purely a question of fact depending on proximity of time and place, continuity of action and unity of purpose and design. [P 227h]

Cr. P. C. —

('41) Chitaley, S. 235, N. 2 Pts. 8, 11b, 13 and 14.

('41) Mitra, Page 819, N. 756.

(d) Penal Code (1860), S. 380 — Accused inducing *M* to deposit her moneys in bank and contriving to open account in joint names of both — Withdrawal of money by accused from bank under his own signature held did not constitute theft.

The accused induced *M* to deposit her moneys in certain banks and contrived to open accounts in the joint names of both himself and *M* giving *M* to understand that the accounts were opened in her name alone. Subsequently the accused withdrew the amounts from the banks under his own signatures without *M*'s knowledge. On complaint by *M* the accused was charged under S. 380 :

Held that S. 380 could not apply to the alleged offences committed in respect of the money drawn from the bank. That money was never in the possession of the complainant; it was in the possession of the bank until withdrawn. It was taken from the possession of the bank with the bank's consent.

[P 228g]

Penal Code —

('40) Ratanlal, Page 935 Pt. 8 ; Page 939, Note

"Without . . . consent."

('36) Gour, Page 1253, N. 4374 ; Page 1263, N. 4393 ; Page 1264, Notes 4394 and 4395.

*Probodh Chandra Chatterjee and Bireswar Chatterjee — for Appellant.**Amiruddin Ahmed and Debabrata Mukherji — for the Crown.**D. N. Bhattacharjee and Anil Chandra Dutt — for Respondent.*

Das J. — This appeal has been preferred by one Becharam Mukherjee who has been convicted by the Additional Chief Presidency Magistrate of Calcutta on 17th December 1942, under S. 380, Penal Code, and on three counts and sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs. 1000 and in default to undergo rigorous imprisonment for another six months, the fine if realised being directed to be paid over as compensation to one Sailaja, who is respondent 2 in this appeal. The prosecution which resulted in the aforesaid conviction and sentence against which the present appeal is directed was initiated by a petition of complaint (Ex. 4) filed by one Manikbala as complainant before the Chief Presidency Magistrate on 27th February 1942, charging the appellant under Ss. 403, 406 and 420, Penal Code. On that date the Chief Presidency Magistrate after examining the complainant referred the matter to the Deputy Commissioner, Detective Department, with a direction to take cognisance if any case is made out.

Sub-Inspector Provakar Mukherjee (P.W. 11) was deputed to take up the investigation. He commenced the investigation on 6th March 1942. The appellant was arrested on 19th March 1942, in the room of one Shefali a

a woman of the town living at No. 7, Gouri Sankar Lane. After investigation the Sub-Inspector on 20th May 1942, submitted two challans in each of which the appellant was charged under S. 406, Penal Code, and alternatively under S. 420, Penal Code. The Chief Presidency Magistrate sent the case to the Additional Chief Presidency Magistrate for disposal. The two challans were amalgamated by the Additional Chief Presidency Magistrate. The trial opened on 29th June 1942. Between 29th June 1942, and 3rd August 1942, 11 witnesses were examined by the prosecution before the Additional Chief Presidency Magistrate, the cross-examination of each of these witnesses being reserved. Charges were framed on 4th August 1942, in three sets, each set containing a charge under S. 380, Penal Code, with an alternative charge under S. 403, Penal Code. It will be necessary to refer to and examine the charges in greater detail hereafter. The appellant having pleaded not guilty the trial continued. The 11 prosecution witnesses were re-called and cross-examined. Four new prosecution witnesses were also examined and cross-examined. The prosecution closed its case on 3rd October 1942. The appellant was examined under S. 342, Criminal P. C., and stated that he would file a written statement. The defence called five witnesses and closed their case on 12th November 1942. Arguments were heard on 24th, 26th and 30th November 1942. On the last mentioned date the appellants' written statement was filed. Judgment was delivered on 7th December 1942 resulting in the conviction and the sentence which I have already mentioned.

The prosecution case may briefly be summarised as follows: One Sm. Sailaja Dassi, a woman of the town of the age of about 35 years, was in the sole keeping of one Balai Chandra Roy for 6 or 7 years. Manikbala is d her foster daughter. Sailaja with Manikbala formerly used to live in a house as tenant of of one Kalo Bina. This Kalo Bina was also a woman of the town and latterly came to be the mistress of the appellant. It was in that house that Sailaja and Manikbala became known to the appellant. He used to address Sailaja as "Didi." Manikbala used to call Kalo Bina "Mashi" and the appellant as "Mesho Babu." Sailaja prospered as a prostitute and made a fortune by her trade. She had a considerable amount of cash and jewellery and ornaments. Four or five years ago she purchased premises No. 4, Imam Bux Lane for Rs. 10,300. After the purchase of this house she removed there with her daughter. Appellant used to come and see them at this

new house and became intimately associated s with them and Sailaja and Manikbala came to place great confidence and reliance on the appellant. The appellant knew about Sailaja's ornaments and cash. In the month of May 1941 Sailaja fell ill and developed signs of insanity. The appellant who then used to come to her place often suggested that it would be better if she were sent to a Hospital. He also said that he knew the authorities of a Hospital and could arrange matters. After some time Manikbala agreed to the suggestion. Thereupon on 18th May 1941, Sailaja was taken by the appellant to a mental Hospital at Dum Dum called Bangiya Unmad f Ashram and kept there for nearly a year. Manikbala used to defray the expenses of Sailaja while she was in the Hospital.

After sending Sailaja to the Dum Dum Hospital the appellant evinced great interest in Manikbala in her helpless condition, she having nobody else to advise her or to look after her interest. In or about July 1941 the appellant impressed upon Manikbala that it was unsafe for her to keep her ornaments and cash in her house and advised her to deposit them in the bank. This advice had been given 10 or 15 times and Manikbala agreed to act upon it on the representation and assurance g that the deposit in the bank would be in her name. The appellant gave her a piece of paper with her name in English written thereon by him and advised her to copy the writing and thereby learn to sign her name in English. The appellant said that bank would not accept Bengali signature. The ironsafe was opened. Rs. 5300 in G. C. Notes and 21 items of ornaments were found therein. A list of the ornaments was prepared and signed by Manikbala. On 31st July 1941 the appellant took Manikbala to the Shambazar Branch of Nath Bank. There a savings bank account was opened in their joint names with Rs. 1300. h From there they went to the Shambazar Branch of Imperial Bank and a savings bank account was opened in that bank in their joint names with Rs. 2000. Manikbala was under the impression that both the accounts were opened in her name alone and the whole of the amount of Rs. 5300 had been deposited in the two banks. On the next day, i.e., on 1st August 1941 the ornaments were taken to a third bank namely the Central Bank. There a safe in the safe deposit vault was taken on hire in the joint names and the ornaments were deposited in that safe. The appellant thereafter made over to Manikbala a key alleging that that was the key of the safe in the deposit vault. Manikbala, of

a course, was under the impression that the safe was hired in her name alone.

After the two accounts had been opened and the ornaments were deposited, the appellant stopped coming to Manikbala's place as often as he used to do. Sometime later on Manikbala wanted to bring back her ornaments and moneys. She saw the appellant 3 or 4 times. As the appellant did not agree, Manikbala became suspicious and went to the Central Bank with Bolai Babu on 23rd February 1942. She took with her the key which had been given to her by the appellant. They went into the vault. She showed the key to a Babu there. The b Babu said that that was a false key. Manikbala and Bolai came back from the bank and on that very date sent a letter to the Central Bank stating that a serious fraud had been practised on her and requesting the bank not to allow any one to open the safe without orders from proper Court. She also went to the two other banks with Bolai and ascertained that the accounts in those banks had been opened in the joint names and only Rs. 1300 and Rs. 2000 had been deposited and practically the whole amount deposited in each of those banks had been withdrawn and the balance on 23rd February 1942 was Rs. 7 in c the Nath Bank and Rs. 10-7-0 in the Imperial Bank. The letter from Nath Bank in reply to her letter dated 23rd February 1942 was dated 26th February 1942, and contained a statement of account. On 27th February 1942, Manikbala filed her petition of complaint. Under order of the Chief Presidency Magistrate the safe in the Central Bank was broken open and was found empty. On investigation it was found that moneys were withdrawn from the two banks on the following dates :

(a) Imperial Bank :

Deposit	Withdrawals
31-7-41 ... 2000	16-10-41 ... 1000
	20-11-41 ... 500
	2-12-41 ... 475
	5/6-2-42 ... 20

(b) Nath Bank :

Deposit	Withdrawals
31-7-41 ... 1300	12-9-41 ... 1100
	19-9-41 ... 100
	2-12-41 ... 75
	5-2-42 ... 20

All the withdrawal slips were signed by the appellant. Not one of them was signed by Manikbala. It also appeared that the safe in the Central Bank had been opened 5 times on the following dates : 21st August 1941, 3rd November 1941, 11th November 1941, 1st December 1941 and 18th December 1941. The records of the Central Bank show that the requisitions for opening the safe were signed by the appellant on each of the 5 occasions the safe

had been opened. Manikbala maintains that she did not receive any portion of the moneys or ornaments withdrawn from the banks. It also transpired that towards the end of December 1941, the appellant deposited rupees 3000 with the owner of the Rang Mahal Theatre premises and his son from whom the appellant and his partner Sarat took the premises and the Stage fittings on hire. This in short, was the prosecution case. It was on the basis of this case that the following charges were framed :

"1. That you Becharam Mukherjee on or about 16th October 1941 at Calcutta committed theft in respect of Rs. 1000 belonging to the complainant Manickbala Dassi and kept in the Imperial Bank, Shambazar Branch, in the Saving Bank Account by dishonestly taking that money out of the account of the complainant on withdrawal slips without the knowledge and consent of the complainant Manickbala Dassi and thereby committed an offence punishable under S. 380, Penal Code, and within my cognizance, or, that you Becharam Mukherjee on or about 16th October 1941, at Calcutta dishonestly misappropriated the sum of Rs. 1000 belonging to the complainant by dishonestly withdrawing the same from the Imperial Bank Shambazar Branch, Calcutta, without the knowledge and consent of the complainant Manickbala Dassi and thereby committed an offence punishable under S. 403, Penal Code, and within my cognizance.

2. That you Becharam Mukherjee on or about 12th September 1941, at Calcutta committed theft in respect of Rs. 1100 belonging to the complainant Manickbala Dassi and kept in the Nath Bank, Shambazar Branch, in the account of the complainant by dishonestly taking that money out of the account of complainant on cheques without the knowledge and consent of the complainant Manickbala Dassi and thereby committed an offence punishable under S. 380, Penal Code, and within my cognizance or that you Becharam Mukherjee on or about 12th September 1941, at Calcutta, dishonestly misappropriated the sum of Rs. 1100 belonging to the complainant by dishonestly withdrawing the same from the Nath Bank, Ltd., Shambazar Branch, Calcutta, without the knowledge and consent of the complainant Manickbala Dassi and thereby committed an offence punishable under S. 403, Penal Code, and within my cognizance.

3. That you Becharam Mukherjee between 21st August 1941 and 18th December 1941, at Calcutta, committed theft in respect of gold ornaments belonging to the complainant and weighing about 150 tollas valued at Rs. 7000 by taking them from the safe deposit vault No. 675A of the Central Bank of India Ltd., rented by the complainant Manickbala Dassi and thereby committed an offence punishable under S. 380, Penal Code, and within my cognizance or that you Becharam Mukherjee between 21st August 1941 and 18th December 1941 at Calcutta dishonestly misappropriated the gold ornaments weighing about 150 tollas valued at Rs. 7000 belonging to the complainant by dishonestly taking them out from the Safe Deposit Vault No. 675A rented by the complainant Manickbala Dassi from the Central Bank of India Ltd., without her knowledge and consent and thereby committed an offence punishable under S. 403, Penal Code, and within my cognizance.

Mr. P. C. Chatterjee appearing for the appellant has severely criticised the charges

a framed by the learned Additional Chief Presidency Magistrate. He contends that the charges as framed were improper and not permissible under the Criminal Procedure Code and that the whole trial has been vitiated thereby. I am inclined to think that Mr. Chatterjee's contentions are well founded and for the following reasons:

(a) The first alternative of the 3rd set of charges namely the charge under S. 380, Penal Code, of theft in respect of the ornaments appear to me to be wholly improper and illegal. I cannot accept Mr. Bhattacharjee's contention that these thefts of different things on different dates separated by considerable periods can be treated as one theft on the analogy of successive blows constituting one assault. In my opinion, the analogy cannot apply to the present case having regard to the lapse of time between the alleged thefts. In my opinion, each of these alleged thefts is a complete offence by itself and cannot be lumped up together into the offences in the way it has been sought to be done in that charge. Each theft is a substantive offence and should be charged separately with reference to particular things alleged to have been stolen. That is the general rule. There are, however, two express exceptions made by S. 222 (2) which provides that when a person is charged with criminal breach of trust or dishonest misappropriation of money it is sufficient to specify the gross sum in respect of which the offence is alleged to have been committed and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates and the charge so framed shall be deemed to be a charge of one offence within the meaning of S. 234. If different charges for other offences could also be lumped up as a rule there would have been no necessity for making any special provisions in respect of criminal breach of trust or dishonest misappropriation. It is pointed out on the other side, that if that were the law then if a thief were clever enough to so contrive that the prosecution could not detect which particular thing was stolen on which particular date, the thief who had stolen a whole lot of things during a definite space or period of time would never be liable to prosecution, although the prosecution could enumerate the total number of things stolen and the dates between which the several thefts took place. There may be many answers. To start with, it will be in rare cases that a thief will be able so to conceal the particulars of the things stolen by him. It is only in exceptional cases

that the thief will evade justice and punishment. Many criminals escape because they are clever enough to conceal their identity. Lastly such a contingency as is said to have happened in this case may only disclose a lacuna or defect in our Criminal Procedure Code. It is not for the Court but for the Legislature to supply the lacuna or rectify the defect. The Code as it stands at present does not, in my judgment, permit such a lumped up or composite charge to be framed in respect of theft.

(b) In this case the appellant is charged with three offences of theft and three offences of dishonest misappropriation in the alternative and all these six offences were tried at one and the same trial. Under S. 233, Criminal P. C., for every distinct offence of which any person is accused there has to be a separate charge and every such charge has to be tried separately except in the cases mentioned in Ss. 234, 235, 236 and 239. Thus, the general rule is that there must be separate trial in respect of each of such charges. The exceptions to this general rule are contained in Ss. 234, 235, 236 and 239. In this case there were three sets of charges. Each set contained two distinct charges of two distinct offences under two distinct sections of the Penal Code and there was one trial. This is not permissible under the general rule contained in part 1 of S. 233. The question is whether such a course is permissible under any of the exceptions contained in Ss. 234, 235, 236 and 239.

I have pointed out above that the third charge does not relate to one offence, but to a number of separate and distinct offences. Therefore, assuming that the offences included in the third charge are of the same kind as those set out in the first and second charges, it is clear that the accused was charged with and tried at one trial for more than three offences of the same kind. This is not warranted by S. 234. Let us now go to the next exception. Section 235 (1) provides that if, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence. The illustrations to this sub-section explain its meaning. Whether a series of acts are so connected together as to form the same transaction is purely a question of fact depending on proximity of time and place, continuity of action and unity of purpose and design. Learned advocates for the respondents contend that the appellant had one single purpose namely to deprive the woman of her properties. He started by con-

a fining the mother in the lunatic Hospital. Then he took advantage of the helpless condition of the daughter and induced her to deposit the moneys and ornaments in the banks and contrived to get the accounts opened in the joint names of himself and the daughter and then robbed her by withdrawing the moneys and ornaments from the banks. The case made out by the prosecution, at the time the charges were framed, seems to me inconsistent with the view that all the acts formed part of the same transaction. It is clear that, according to the prosecution, the accused was free to withdraw the entire deposit from each bank in one instalment, and to take all the ornaments from the safe deposit at one time. The fact that he did not do so indicates that the various alleged thefts or misappropriations were in fact isolated and independent crimes; that success in one crime led the accused to commit another; and that the alleged offences were due to periodical lapses. The way certain items of offences have been picked out and made subject-matter of different charges does not indicate that the prosecution or the Magistrate treated them as parts of the same transaction. If therefore the withdrawals were independent crimes then although the *modus operandi* was similar, S. 235 (1) will be of no assistance to the respondents. Nor will sub-S. (2) of that section apply. This sub-section covers the case where the particular acts constitute an offence falling within two or more separate definitions of any law by which offences are defined or punished. It does not cover the case where different sets of acts constitute different offences as the illustrations clearly show. Sub-section (3) of S. 235 has clearly no application.

The next exception is S. 236. It applies when a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute. In such a case the accused may be charged with having committed all or any of such offences and any number of such charges may be tried at once or he may be charged in the alternative with having committed some one of the said offences. This section will therefore justify the two alternative charges in each of the three sets of charges taken separately. Each withdrawal is a single act or a series of acts. If it is doubtful whether a particular withdrawal is theft or dishonest misappropriation, the accused may be charged with theft and dishonest misappropriation or with theft or dishonest misappropriation in respect of such withdrawal. It clearly does not apply where there are two separate single

acts or two separate series of acts, each of which constitutes a separate offence although each of such separate offences may fall within one or more definitions of offences. In other words each set of charge in this case taken separately may be supported by this section but it does not authorise or justify the joinder of three sets of charges founded on three several acts of three several series of acts.

Section 239 is clearly inapplicable to this case. The result is that in my opinion there has been a good deal of irregularity in framing and joinder of charges. This joinder of charges does not appear to me to be sanctioned by S. 234 or S. 236, Criminal P. C. In view of my observations regarding the application of S. 234, the question whether Ss. 234 and 236 can be combined does not arise in the present case. In the facts and circumstances of the case I am not satisfied that the joinder of charges is saved by S. 235. The joinder of these charges have therefore been in contravention of S. 233 and as such the illegality cannot be cured under S. 537. The conviction and sentence, therefore, must be set aside and the case sent back for retrial by some other Magistrate.

In view of our decisions stated above we do not consider it right to express any opinion on the facts of this case. I desire however to point out to the learned Magistrate that S. 380, Penal Code, cannot apply to the alleged offences committed in respect of the money drawn from the bank. That money was never in the possession of the complainant; it was in the possession of the bank until withdrawn. It was taken from the possession of the bank with the bank's consent. Pending the retrial, let the appellant continue on the same bail as he is on now.

Lodge J.—I agree.

G.N.

Retrial ordered.

A. I. R. (31) 1944 Calcutta 228

RAU AND B. K. MUKHERJEA JJ.

*Sashi Kumar Baishnab and others —
Plaintiffs — Appellants*

v.

*Ramani Mohan Das and others —
Respondents.*

Appeal No. 826 of 1941, Decided on 28th June 1943, from appellate decree of Addl. Dist. Judge, 3rd Court, Bakerganj, D/-5th February 1941.

Bengal Land Revenue Sales Act (7 of 1868) and (11 of 1859) — *Osat Nimhowla* held not in existence at time of sale — Sale held therefore void.

One S held a howla or tenure directly under Government. Subsequently, in 1902 he created a *Nimhowla* or under-tenure by granting settlement

of 175 bighas odd out of his lands to *P*. Thereafter *P* sold the Nimhowla to one *R* and took a sub-lease or Osat Nimhowla from him. In 1933, the Government sold the Howla for arrears of rent and purchased it themselves. Then in 1937 they similarly sold and bought the Nimhowla and finally on 23rd June 1938, the Osat Nimhowla was sold for its arrears to *D* :

Held that there was no Osat Nimhowla in existence at the time of the revenue sale in 1938 and that therefore the sale was void. [P 230c,d,e]

Held also that the effect of the entry "not recognized by the Government" in the settlement papers was at least to deprive the tenures of the protection of the third exception in S. 12: ('14) 1 A.I.R. 1914 Cal. 852 and ('32) 19 A. I. R. 1932 Cal. 514, *Foll.* [P 230a]

Panchanan Ghose and Sukumar Ghose (Jr.) — for Appellants.

Atul Chandra Gupta and Bhuvan Mohan Saha (Jr.) — for Respondents.

Rau J. — This is an appeal by the plaintiffs in a suit brought by them for a declaration that a certain revenue sale held under Bengal Act 7 of 1868 read with Act 11 of 1859 was without jurisdiction and for confirmation of possession. The land in suit is an Osat Nimhowla in a Government Khas Mahal in the Sunderbans. It appears that one Sunu Howladar held a Howla or tenure directly under Government. Subsequently, in 1902 he created a Nimhowla or under-tenure by granting settlement of 175 bighas odd out of his lands to the plaintiffs. Thereafter, the plaintiffs sold the Nimhowla to one Ramjiban and took a sub-lease or Osat Nimhowla from him. In 1933, the Government sold the Howla for arrears of rent and purchased it themselves. Then in 1937 they similarly sold and bought the Nimhowla and finally on 23rd June 1938, the Osat Nimhowla was sold for its arrears to the principal defendant in the present suit. It is this last sale that is attacked in the suit and it is attacked on the ground that the interest of the Osat Nimhowladar was not saleable under the aforesaid Acts. The trial Court decreed the suit but the decree was reversed by the lower appellate Court. The only point for decision in this second appeal is whether at the time of the sale in 1938 the Osat Nimhowla was a tenure that could be properly sold under the Acts of 1859 and 1868. Speaking generally, Act 11 of 1859 directs the sale of estates for arrears of revenue and Act 7 of 1868 directs the sale of tenures for arrears in the same manner and subject to the same provisions. The term 'tenure' is defined in the Act of 1868 thus :

"The word 'tenure' includes all interests in land, whether rent-paying or lakhiraj (other than estates as above defined), and all fisheries, which, by the terms of the grants creating the same or by the custom of the country, are transferable, whether such tenures are resumable or not and whether the

right of selling or bringing them to sale for an arrear of rent may or may not have been specially reserved by stipulation in any instrument."

The provision for sale of tenures is contained in S. 11 of the same Act which runs :

"Whenever any revenue payable to Government in respect of any tenure not being an estate shall be in arrear after the latest day of payment fixed in the manner prescribed in S. 3 of Act 11 of 1859, the Collector to whom such revenue is payable may cause the tenure to be sold in the manner and subject to the provisions in and by the said Act 11 of 1859 provided for the sale of estates for the recovery of arrears of revenue."

The appellants contend that the Osat Nimhowla was not a saleable tenure within the meaning of these provisions. The argument is briefly this: To be saleable under the Act a tenure must first be liable to payment of revenue. 'Revenue' is defined in the Act as what is annually payable to the Government by the proprietor and proprietor in the case of a tenure means the tenant by whom his tenure is held directly under the Crown. Therefore a tenure to be saleable must be one held directly under the Crown. Further, it must be transferable for otherwise it would not be a tenure at all within the definition quoted above. Sunu Howladar's Howla was undoubtedly a tenure. But it is contended that when that Howla was sold for arrears of revenue and purchased by the Government both the Nimhowla and the Osat Nimhowla came to an end. These subordinate interests may have been transferable tenures as originally created and vis-a-vis the persons creating them but they were nothing more than incumbrances on Sunu's Howla so far as the Government were concerned, and upon the Howla being sold they were extinguished by S. 12 of the Act, 1868; and even if the Nimhowla is held to have been subsequently revived in some way, nevertheless, when that Nimhowla in its turn was sold for arrears of revenue, the effect was to extinguish the Osat Nimhowla. In support of the contention that the Nimhowla and the Osat Nimhowla were nothing more than incumbrances the appellants point to certain entries in the settlement papers which consistently describe them as "Sarkar Bahadur kartrick aswikrita," that is to say, as not recognised by the Government. In other words vis-a-vis the Government, they must be treated as mere incumbrances which were swept away by S. 12 of Act 7 of 1868. The relevant portion of this section runs :

"The purchaser of any tenure sold under the provisions of S. 11 of this Act shall acquire it free from all incumbrances which may have been imposed upon it after its creation, or after the time of settlement, whichever may have last occurred, and shall

a be entitled to avoid and annul all under-tenures, and forthwith to eject all under-tenants, with the following exceptions Thirdly, tenures created or recognised by the settlement proceedings of any current temporary settlement, as tenures bearing a rent which is fixed for the period of such settlement"

b The validity of the above argument on behalf of the appellants depends upon the exact effect of the entry "not recognised by the Government" in the settlement papers. After the decisions in 20 C. L. J. 40¹ and 56 C. L. J. 4,² where similar expressions were interpreted, it must be conceded that the effect of the entry is, at least, to deprive these tenures of the protection of the third exception in S. 12. But the question still remains: Are they to be looked upon as mere incumbrances swept away by the revenue sale of the Howla and Nimhowla respectively or are they to be looked upon as tenures which although not saved by the aforesaid third exception subsist until avoided and annulled? Paragraph 8 of the defendant-respondent's written statement is important in this connexion. It states that he neither believes nor admits that there were Pottas creating the Nimhowla or the Osat Nimhowla. It goes on to assert that the Pottas alleged were never acted upon and that there was no stipulation or rule for payment of the rent in the four alleged instalments of Ashar, Aswin, Pous Chaitra; and it concludes by saying that even if the plaintiffs were somehow able to prove the Pottas, neither these Pottas nor any of the terms thereof bound or could bind the Government. In view of this comprehensive repudiation, it is not possible for us in this particular case to cut down the meaning of the words "not recognised by Government." We are constrained to hold that they mean what the defendant-respondent himself has asserted, namely, that so far as the Government were concerned, these subordinate interests were to be entirely ignored. It follows that they were not under-tenures at all requiring to be annulled by the Government under S. 12 of Act 7 of 1868. At most they were incumbrances which fell with the revenue sales. If then the Osat Nimhowla had no existence after the sale of the Nimhowla in 1937, can it be said to have been revived or created subsequently by a fresh grant or the equivalent of a grant? There is no evidence whatsoever on this point. No new grant is

alleged by either side and the defendant respondent's repudiation of the kists named in the original potta shows that his own case is that the old grant was not renewed in all its incidents. There is no material on the record from which we can infer that the old grant was renewed on any ascertainable terms. Thus we are driven to the conclusion that there was no Osat Nimhowla in existence at the time of the revenue sale in 1938 and that therefore the sale was void. The appeal is allowed and the trial Court's decree is restored. The parties will bear their own costs in this Court and in the lower appellate Court.

B. K. Mukherjea J. — I agree.

R.K.

Appeal allowed.

A. I. R. (31) 1944 Calcutta 230

HENDERSON J.

A. N. M. Azizal Bari — Appellant

v.

Jew Mahammad Khan Kabuli and another — Respondents.

Appeal No. 73 of 1942, Decided on 7th December 1943, from appellate order of Addl. District Judge, 24 Parganas, Alipore, D/- 7th November 1941.

Bengal Money-lenders Act (10 of 1940), S. 38 (3) — Appeal by debtor under S. 38 (3) — Fixed court-fee of Rs. 20 held payable under Sch. 2, Art. 17, Court-fees Act—Sch. 2, Art. 11 Court-Fees Act, held inapplicable.

The debtor filed an application under S. 38 and obtained a declaration that the amount due was Rs. 1085. He filed an appeal under S. 38 (3) by which he asked the Court to say that only Rs. 150 were due. The question was as to the amount of court-fee payable in appeal :

Held that (1) in view of the provisions of S. 38 (3) the appeal must be regarded as one from an order having the force of a decree and therefore Sch. 2, Art. 11 had no application; [P 231a,b]

(2) the only relief which the appellant asked for being a declaratory decree a fixed court-fee of Rs. 20 was payable under Sch. 2, Art. 17. [P 231b] h

Bhuban Mohan Saha (Jr.)—for Appellant.

Md. Asir — for Respondents.

Judgment.—This appeal raises a question of court-fees. The appellant filed an application under S. 38, Bengal Money-lenders Act, and obtained a declaration that the amount due was Rs. 1085. He has filed an appeal by which he asks the Court to say that only Rs. 150 is due. Thus there can be no question that, if any ad valorem fee is demanded, it must be paid on the sum of Rs. 935. The learned Judge observed that the appellant has not paid ad valorem court-fee and thereupon dismissed the appeal.

The contention of the appellant is that a fixed fee of Re. 1 is payable under Art. 11 of

1. ('14) 1 A.I.R. 1914 Cal. 852 : 24 I. C. 253 : 20 C. L. J. 40, Lakhindra Barua v. Saroda Charan Dey.

2. ('32) 19 A.I.R. 1932 Cal. 514 : 137 I. C. 311 : 56 C. L. J. 4, Nagendra Chandra De v. Har-kumar De.

a Sch. 2, Court-Fees Act. If he is wrong, then the case must come within Art. 17. The question is not free from difficulty. It depends upon whether it can be said that the appeal is not from a decree or an order having the force of a decree. The appeal is specifically provided for by S. 38 (3). That sub-section provides:

"A declaration under this section shall be subject to appeal, if any, as if it were a decree of the Court, and every decision in appeal shall be subject to appeal to the High Court in the same manner as a decree passed in appeal."

b In view of that specific provision it seems to me to be impossible to say that the appeal is not one from an order having the force of a decree. That, however, is not sufficient to dispose of the matter. The only relief which the petitioner asks for is a declaratory decree. For this there is a fixed court-fee of Rs. 20 and not an ad valorem court-fee. The appeal is accordingly allowed and the order of the lower appellate Court dismissing the appeal is set aside. The appellant will be given one month from the date of the arrival of the record in the lower appellate Court to file the deficit court-fee. If he does so, the Judge will hear and determine in accordance with law. If he does not do so, the appeal will stand c dismissed. The respondents will pay the costs of the appellant in this appeal in any event—hearing-fee one gold mohur. No order is necessary on the application.

G.N. *Appeal allowed.*

A. I. R. (31) 1944 Calcutta 231

HENDERSON J.

Kishoreganj Co-operative Town Bank Ltd.—Decree-holder—Appellant

v.

Rukmini Kanta Bhattacharjya and others—Respondents.

d Appeal No. 237 of 1942, Decided on 21st February 1944, from appellate order of Sub-Judge, Fourth Court, Mymensingh, D/- 30th April 1942.

Bengal Agricultural Debtors Act (7 of 1936), Ss. 33 and 34—Notice under S. 34 prior to sale—Sale postponed sine die—Decree-holder applying for review—Review allowed without notice to judgment-debtor—Sale held—Sale held invalid being in contravention of S. 34—Mere omission to issue notice to judgment-debtor held could not invalidate sale—Judgment-debtor held could move under Section 47, Civil P. C.

The execution petition was filed while the judgment-debtor's application was pending before the Debt Settlement Board. On the day fixed for holding the sale a notice under S. 34, Agricultural Debtors Act, was received from the Board. The Munsif made an order postponing further proceedings sine die. The decree-holder then filed an application for review

and the Munsif allowed it off-hand without properly considering the questions involved and without giving any notice to the judgment-debtor. As a result the sale was held behind the back of the judgment-debtor:

Held that although no notice was given of the review application the sale could not be held to be a nullity on that account. [P 232b]

Held further that the sale having been held in contravention of the provisions of Ss. 33 and 34, Bengal Agricultural Debtors Act, was a nullity and there was nothing to prevent the judgment-debtor from obtaining relief by his application under S. 47, Civil P. C. : ('43) 30 A. I. R. 1943 Cal. 624 and 47 C.W.N. 891, *Expl.* [P 232b,c,f,g]

C. P. C. —

('44) Chitale, S. 47, N. 7 (a) Pt. 36.

('41) Mulla, Page 190.

Birendra Kumar De — for Appellant.

Nirmal Chandra Chakravarty—for Respondents.

Judgment.—This appeal is by the decree-holder. It arises in connexion with the execution of an award made by an arbitrator appointed under rules made by the Local Government under the provisions of the Co-operative Credit Societies Act. A certain property belonging to the judgment-debtor was sold. He filed an objection under S. 47, Civil P. C., on the ground that the sale was a nullity. It was dismissed by the Munsif. On appeal the sale has been set aside by the Subordinate Judge. 9

The sale was held in violation of the terms of Ss. 33 and 34, Bengal Agricultural Debtors Act. The practical question argued before me is the proper procedure which ought to be followed by the judgment-debtor if he desires to have it set aside, or, if it does not require to be set aside, to obtain a declaration that his interest has not been affected by it.

To understand the arguments made the following facts must be stated. The execution petition was filed while the judgment-debtor's application was pending before the Debt Settlement Board. On the day fixed for holding the sale a notice under S. 34 was received from the Board. The Munsif made an order postponing further proceedings sine die. The decree-holder then filed an application for review. The whole of the present difficulty is due to the fact that the Munsif allowed it off-hand without properly considering the questions involved and without giving any notice to the judgment-debtor. As a result, the sale was held behind the back of the judgment-debtor in circumstances in which the only bidder who could be expected to be present was the decree-holder. When the judgment-debtor came to know of the sale it was too late for him to apply to have it set aside in view of the provisions of Art. 166, Limitation

^a Act, and he could only succeed by showing that it was a nullity. The decree-holder, however, has not sought to take advantage of this defect, in the actual order made by the learned Subordinate Judge. But there can be no question that the judgment-debtor was in a serious position when he discovered that his property had been sold in this illegal way.

Two contentions were put forward in support of his case that the sale was a nullity, (1) that, inasmuch as no notice was given of the review application, the order allowing it and all subsequent proceedings were null and void and (2) that the sale was void inasmuch as it was held in contravention of the provisions of S. 33 and S. 34, Bengal Agricultural Debtors Act.

On the former point the decisions are conflicting. But I am satisfied that the weight of authority is to the effect that the sale cannot be held to be a nullity on that account.

On the second point I do not think that it can be seriously contended that a sale held in contravention of the provisions of ss. 33 and 34, Bengal Agricultural Debtors Act, is not a nullity. It is a stronger case than a sale held without issuing the notice prescribed under O. 21, R. 22, Civil P. C., and, until the recent amendment of the rule, such a sale was held to be a nullity. I have myself no doubt that the sale held in the present case was a nullity.

It has, therefore, become necessary to consider what procedure ought to be adopted by the judgment-debtor in order to get rid of it. It frequently happens that no notice under S. 34 is issued at all. In the present case, if the notice had arrived a day later, the judgment-debtor could only have succeeded by showing that the sale was held in violation of the provisions of S. 33. The only way open to him would have been to file an objection under S. 47 as he has actually done in the present case. The question for consideration is whether the fact that the notice under S. 34 was received makes any difference. I must confess that I should have found no difficulty in dismissing the appeal if it had not been for the recent decisions in 47 C. W. N. 796¹ and 47 C. W. N. 891,² upon which Mr. De relies. When those decisions are studied it seems to me to be quite clear that they really proceed upon the principle of *res judicata*, they are both concerned with the effect of a determination by the Court to ignore the notice and

proceed with the execution case. It seems perfectly reasonable to say that, when the judgment-debtor does not appeal against this decision, he cannot be allowed to re-agitate the matter by attacking the sale after it has taken place.

The reason given in the decision is that the proper remedy is by appeal or revision. That implies that there is some order against which an appeal could be made. In the present case the Munsif held that the notice was binding upon him and that no further proceedings could be taken as long as the notice remained in force. This was a decision in favour of the judgment-debtor. There was no reason why he should appeal against it. It was for the decree-holder to appeal and as he did not do so, he should not be allowed to contend in any subsequent execution proceeding that the sale was held with jurisdiction. There remains the order allowing the decree-holder's application for review. The petitioner could undoubtedly have appealed against it. But the only question for decision in that appeal would have been whether notice of the application had been given. The question whether the sale was void would not have arisen for consideration at all. The result is that, in my opinion, there is nothing to prevent the judgment-debtor from obtaining relief by his application under S. 47. The appeal is dismissed. I make no order as to costs.

R.K.

Appeal dismissed.

A. I. R. (31) 1944 Calcutta 232

HENDERSON J.

Sarat Chandra Pal, his heirs and legal representatives Sudhansu Kumar Pal and others — Appellants

v.

*Nur Muhammad Hazi Yacub —
Decree-holder — Respondent.*^h

Appeal No. 22 of 1942, Decided on 14th June 1943, from appellate order of Sub-Judge, Third Addl. Court, 24 Parganas, Alipore, D/- 3rd December 1941.

Bengal Agricultural Debtors Act (7 of 1936), S. 33 — Small Cause Court decree transferred for execution to mofussil Court — Subsequent award by Debt Settlement Board — Execution application after award cannot be entertained by transferee Court although pending executions can proceed for whole amount of decree — Small Cause Court can however entertain fresh applications for execution.

Where a decree has been in the Presidency Small Cause Court which is transferred for execution to a mofussil Court, and the judgment-debtor subsequently obtains an award on an application to a Debt Settlement Board, the decree-holder cannot file an execution application in the transferee Court in view

1. ('43) 30 A.I.R. 1943 Cal. 624 : 210 I. C. 320 : 47 C. W. N. 796, Mohammad Ibrahim v. Saburjan Bewa.

2. ('43) 47 C. W. N. 891, Abinash Chandra Biswas v. Nakul Ruhidas.

a of S. 33 of the Act. The decree-holder is entitled to execute the decree in the Court which passed it but he cannot, in view of the provisions of S. 33, make any application for execution (it being necessary under O. 21, R. 10, Civil P. C.) in a transferee Court which is a civil Court within the meaning of S. 2 (6A). In other words, he must remain content with such relief as he may obtain by executing the decree in the Small Cause Court: ('41) 28 A. I. R. 1941 Cal. 706, *Reconsidered and held wrongly decided*. [P 234a]

b Section 33 however has no application to pending cases. When the execution application has already been entertained by the transferee Court before the judgment-debtor has applied to the Debt Settlement Board, the bar under S. 33 does not come into existence and the decree-holder can proceed with the execution in spite of the award for the whole amount under the decree. But future execution applications will be prohibited except under the provisions of Section 29 (5). [P 234b, c]

Shyama Charan Mitter — for Appellants.

Prokas Chandra Mallik — for Respondent.

Judgment. — This appeal is by the judgment-debtors. The respondent obtained a decree in the Small Cause Court, Calcutta, against the appellants' father Sarat Chandra Pal for the price of goods supplied to his business. The decree was transferred to the Court at Alipore, for execution and the immovable property of the judgment-debtor was attached. The usual sort of objections were taken by the present appellants and other relatives but they failed. In the meantime Sarat Chandra Pal applied to a Debt Settlement Board and the execution proceedings were stayed on receipt of a notice under S. 34, Bengal Agricultural Debtors Act, on 20th April 1939. On 2nd April 1941, the respondent applied to the Court with a prayer that the stay order be vacated. The judgment-debtor filed what amounts to an objection under S. 47, Civil P. C., to the effect that the execution could not proceed on various grounds. The Munsif allowed the objection and dismissed the execution case. The decree-holder appealed. While the appeal was pending the Board made an award. As the amount of the debt had been decreed by a Court it could not be reduced by the Board without a flagrant violation of the law. It was, however, made payable in 19 instalments. On appeal the learned Subordinate Judge set aside the Munsif's order and directed execution to proceed. The judgment-debtor appealed to this Court. He died during the pendency of the appeal and his sons have been substituted in his place.

When the Munsif dealt with the matter the notice under S. 34 still enjoyed whatever force it ever had. It became spent, however, when the Board made the award while the

appeal was pending in the lower appellate Court. The only question for consideration now is whether the respondent is entitled to proceed with his execution case.

The liability is undoubtedly a debt under the definition of a debt in S. 2 (8) of the Act. Furthermore, under the provisions of S. 20 it is for the Board to determine whether the liability is a debt or not. The Board undoubtedly had jurisdiction to deal with the matter and has made an award by the terms of which the debt is to be paid in 19 annual instalments. Under the provisions of S. 23 in case of default of any instalment it may be recovered as though it were a public demand. Under S. 23 (2) the Certificate Officer may allow the judgment-debtor time. It is undoubtedly anomalous if the decree-holder can realise the whole amount in these execution proceedings. But the existence of an anomaly cannot deprive the decree-holder of any right which he may have under the law.

Ordinarily, execution proceedings such as these would be barred under the provisions of S. 35. But, in view of the definition of 'Civil Court' in S. 2 (6A), the decree now under execution is not a decree within the meaning of this section. Mr. Mitter, however, contended that the present proceedings are barred under section 33.

The section lays down that no civil Court shall entertain an application against the debtor in respect of any debt for which any amount is payable under an award except in accordance with the provisions of sub-s. (5) of S. 29. The first question to be considered is whether the Court of the Munsif is a civil Court within the meaning of the section.

a The learned Subordinate Judge relied upon a decision of mine in 45 C. W. N. 922.¹ That decision deals with a case under S. 34 of the Act. But I see no reason to suppose that the term 'Civil Court' has a different meaning in S. 33. After further consideration I have reached the conclusion that that decision was wrong for a reason which was not then under consideration. The only point then discussed was whether the decree had been passed by a civil Court.

A further point, however, arises whether the Court of the Munsif now executing the decree is a Court within the meaning of S. 33. It is undoubtedly a Court within the definition of S. 2 (6A). It is prohibited from entertaining any suit, application or proceeding against the decree in respect of this debt. The

1. ('41) 28 A. I. R. 1941 Cal. 706 : 198 I. C. 735 : I. L. R. (1941) 2 Cal. 543 : 45 C. W. N. 922, *Geo Miller & Co., Ltd. v. Pabna Motor Service*.

a fact that the liability is based on a decree by a Court which is not a Court within the definition of S. 2 seems to me to be really irrelevant. The true position appears to be that, while the respondent is in this case entitled to execute the decree in the Court which passed it, he cannot in view of the provisions of S. 33 make any application for execution in a transferee Court which is a civil Court within the meaning of S. 2 (6A). In other words, he must remain content with such relief as he may obtain by executing the decree in the Small Cause Court.

It therefore becomes necessary to consider b whether it can be said that the Munsif in the Court at Alipore entertained this application for execution in contravention to the provisions of S. 33. In the first place, it is true that an application for transfer of the decree had to be made to the Small Cause Court under S. 39, Civil P. C. But this does not work automatically. It is still necessary to make an application to the transferee Court under O. 21, R. 10. In my judgment that would be an application within the meaning of S. 33. I have, however, reached the opinion that S. 33 has no application to pending cases. When the present application was entertained c the judgment-debtor had not applied to the Debt Settlement Board and the bar under S. 33 had not come into existence. Although future applications of this kind will be prohibited except under the provisions of S. 29 (5), there is no bar to the present application. For these reasons I am of opinion that, however anomalous it may be, the respondent is entitled to go on with these proceedings.

It only remains to deal with the appellants' plea of estoppel. Briefly, this is based on the alleged conduct of the decree-holder in connexion with the proceedings before the Board. The learned Subordinate Judge refused to d deal with it. Though it is a matter of the utmost importance, questions of fact are involved and it is impossible to determine it without evidence. I merely note that Mr. Mallik stated that his instructions are that the decree-holder took no part in the proceedings and never accepted the terms of the award. He also stated that he would contend that the appellants cannot rely on estoppel as they have themselves failed to carry out their side of the alleged agreement.

The result is that the order of the lower appellate Court directing execution to proceed is set aside and the case is remanded to him in order that he may determine whether the decree-holder is estopped from proceeding with the present execution case. If this is answered

in the affirmative, he will dismiss the appeal; if it is answered in the negative, he will allow the appeal and direct execution to proceed. The attachment will remain in force. Both sides will be at liberty to adduce evidence.

Costs in this Court will abide the result—
hearing-fee two gold mohurs.

R.K.

Case remanded.

A. I. R. (31) 1944 Calcutta 234

LODGE AND ROXBURGH JJ.

*Superintendent and Remembrancer of
Legal Affairs, Bengal — Appellant* f
v.

*Golok Tikadar and others — Accused —
Respondents.*

Government Appeal No. 5 of 1941, Decided on
24th March 1942.

(a) Criminal P. C. (1898), Ss. 417, 422 and
423 — Government appeal against acquittal of
several accused — Some of accused not served
with notice — Appeal could be heard in respect
of accused served with notices.

The Government appeal under S. 417 was in
respect of 58 accused persons, and orders had been
passed directing issue of notice and re-arrest of all 58
accused persons. Notices had been served however on
40 only of the accused persons, and 40 only had been g
re-arrested. It was contended that as one appeal only
had been presented, the appeal could not be heard
until all the accused persons named in the memo-
randum of appeal had been served as the piece-meal
hearing of the appeal was contrary to fundamental
principles of criminal justice and was unknown to
English law :

Held that there had been in effect 58 appeals
against 58 different accused persons presented by the
Local Government and there would be no legal bar
to the separate hearing of the appeal against each
separate accused person. It was convenient to con-
solidate the appeals against the appearing respon-
dents, but it was not legally necessary so to do. The
appeal therefore could proceed against the accused
who had been served with notice of appeal.

[P 236a,b] h

Cr. P. C. —

(41) Chitaley, S. 422, Notes 1 and 3.

(41) Mitra, Page 1333, N. 1137.

(b) Penal Code (1860), Ss. 149 and 34 —
Offence committed by two or more members
of assembly acting in furtherance of common
intention—S. 149 applies—Two or more mem-
bers of assembly found guilty under S. 34—
Other members may be liable under S. 149.

Since the context in S. 149 does not suggest any-
thing to the contrary within S. 9 the opening words
of S. 149 may be read as "If an offence is committed
by any member or members of an unlawful assembly
etc. . . ." and the section itself will apply in terms
to cases where the offence in question is committed
not by a single individual but by several individuals
acting in concert. Moreover according to the defini-
tion of "offence" in S. 40 of the Code the word
"offence" as used in S. 149 denotes anything made
punishable by the Code. Where a person becomes

a liable in respect of a criminal act done by him in furtherance of the common intention of himself and others and is punishable in respect of his part in the act he is himself guilty of an offence. The offence of which he may be guilty may be different from that of the others engaged along with him in the commission of the criminal act (S. 38) but it will nevertheless clearly be an offence within the meaning of the word as used in S. 149 of the Code. Section 149 therefore applies equally in cases where offences are committed by single members of the assembly and in cases where offences are committed by two or more members of the assembly acting in furtherance of a common intention and a member of an unlawful assembly will be liable for an offence jointly committed by 2 or 3 members of the assembly if that offence was committed in prosecution of the common object of the assembly or was such as the members of the assembly knew to be likely to be committed in prosecution of the common object. Therefore where b two or more members of an assembly are found guilty of an offence by reason of S. 34, the other members of the assembly may be liable for that offence under S. 149 : 8 Cal. 739, *Expl.*

[P 237b,c,d,e,f]

Penal Code —

(40) Ratanlal, Page 355, Note "Sections 34 and 149;" Page 356, Note "Scope."

(36) Gour, Page 517, N. 1412; N. 1413; Page 186, Notes 270 to 273 ; Page 187, N. 275.

(c) **Criminal P. C. (1898), Ss. 417 and 423—**
Appeal under S. 417 against acquittal — Court can review evidence and find accused guilty.

c The High Court is competent in appeal by Government under S. 417 against acquittal to review the evidence and if satisfied to convict the respondents but as the case was eminently one which ought to be decided by a jury on a proper trial and with proper directions from the Judge the High Court did not propose to examine the evidence against each accused in detail but ordered a retrial. [P 238f]

Cr. P. C. —

(41) Chitaley, S. 423, Nn. 15 and 19.

(41) Mitra, Page 1311, N. 1120 ; Page 1340, N. 1141.

(d) **Penal Code (1860), Ss. 302 and 201—Some victims murdered, bodies removed and destroyed — Other victims murdered but bodies not removed — Charges under Ss. 302 and 201 need not be framed in respect of persons whose d bodies have been removed.**

Where a person is said to have been killed and his body taken away and destroyed by his murderers there is ample justification for framing charges under S. 302 and under S. 201. But where in addition to the allegation that some victims have been murdered and their bodies removed, there is clear evidence that others have been murdered whose bodies have not been removed and destroyed, no useful purpose is served by framing charges under Ss. 201 and 302 in respect of the persons whose bodies have been removed. The framing of a large number of charges serves merely to confuse the jury, and the offence of murder is satisfactorily established if the murder of one out of a number of victims is proved. [P 239b,c]

Penal Code —

(40) Ratanlal, Page 757, Note "Discovery of body necessary."

(36) Gour, Page 1015, Note "Charge;" Page 700, N. 2142.

Carden Noad and Amiruddin Ahmad —
for Appellant.

N. K. Basu, Satindra Nath Mukherjee, Samarendra Nath Mukherjee and Joy Gopal Ghose; and Obaidul Huq — for Respondents 7, 9, 11, 15 to 17, 21 to 38, 41 to 43, 45, 46, 48 to 54 ; and 6, 9, 11, 13, 15 to 18, 21 to 23 and 39, respectively.

Lodge J.—This appeal has been presented in accordance with the provisions of S. 417, Criminal P. C., by the Legal Remembrancer to the Government of Bengal. 58 persons were placed on trial before the Additional Sessions Judge of Khulna on charges of rioting, murder, grievous hurt and causing disappearance of evidence. The jury returned an unanimous f verdict of not guilty in respect of some of the accused and a majority verdict (6 against 3) of not guilty in respect of the remaining accused. The learned Judge accepted the verdict of the jury and acquitted all the accused persons. It has been contended on behalf of the Crown that in his charge to the jury, the learned Judge made so many mistakes in placing the evidence before the jury, that a completely erroneous picture of the evidence on record was given; that the learned Judge misdirected the jury as to the law applicable to the facts of the case; and that the learned Judge consistently refrained from drawing g the attention of the jury to the evidence which supported the prosecution case, and in effect presented the case to the jury as though there was no reliable evidence for the prosecution.

Mr. N. K. Basu appearing on behalf of some of the respondents, took a preliminary objection to the hearing of the appeal. Mr. Basu pointed out that the Government appeal was in respect of 58 accused persons, and orders had been passed directing issue of notice and re-arrest of all 58 accused persons. Notices had been served, however, on 40 only of the accused persons, and 40 only had been re-arrested. Mr. Basu contended that as one h appeal only had been presented, the appeal could not be heard until all the accused persons named in the memorandum of appeal had been served with notice and given an opportunity of contesting the appeal. Mr. Basu was unable to point to any provision of law directly bearing on the question, but he contended that the piece-meal hearing of the appeal was contrary to fundamental principles of criminal justice and was unknown to English law.

We are unable to accept this contention. It is obvious that the accused persons who have not received notice of the appeal, will not be governed by our decision, but we are unable to understand how they or the appear-

a ing respondents will be prejudiced thereby. In our opinion, there have been in effect 58 appeals against 58 different accused persons presented by the Local Government, and there would be no legal bar to the separate hearing of the appeal against each separate accused person. It is convenient to consolidate the appeals against the appearing respondents, but it is not legally necessary so to do. If effect were given to Mr. Basu's contention, it would mean that the appeal could not be heard so long as a single accused person succeeded in evading service of notice, and the remaining accused might be detained in custody for an indefinite period. We are satisfied that it is not merely permissible but desirable to hear the appeal in respect of those accused only upon whom notices of the appeal have been served.

b As to the merits of the appeal, Mr. Basu did not dispute the Crown contention that the learned Judge's charge contained so many inaccuracies regarding the evidence as to make the presentation of the evidence materially incorrect: but he contended that the learned Judge's explanations of the law were correct and that in spite of the learned Judge's mistakes in presenting the facts, the appeal should not be allowed. It will suffice for the purposes of this appeal to give a very brief outline of the case for the prosecution and of the defence set up. Plot No. 1667 of mouza Atlia was mortgaged by Jogendra Nath Mazumdar, and the mortgagees sold their interest in the land to complainant Abdul Barik, and the complainant was in possession for some years prior to the date of occurrence. In a partition suit between Jogendranath Mazumdar and others, to which complainant Abdul Barik was not a party, a petition of compromise was filed and the suit was decreed on compromise. According to the compromise decree, this plot fell entirely to the share of Ratanmani Dasya and Rash Behari Tikadar. Thereafter possession of the land was disputed between Abdul Barik on the one hand, and Golak Tikadar on the other. The land is situated in mouza Atlia which is within police station Terokhada, district Khulna. The accused party are for the most part residents of Ghanashyampur, within police station Khalia, district Jessore. Atlia and Ghanashyampur are contiguous villages, the boundary of the two districts separating them from each other. The boundary was formerly a khal, but at the time of occurrence was a mere depression covered with grass. At 4 P. M. on 19th April 1940, a band of Namasudras from Ghanashyampur and neighbouring villages assembled to take possession of

the land and to attack Abdul Barik. They were armed with guns, spears, shields, etc. The Muslims of Atlia collected to oppose the Namasudras and one Masim Sheikh of Atlia was sent to Terokhada police station with the news that a breach of the peace was imminent. Before the police could intervene, the Namasudras advanced and the Mahomedans withdrew to the land of Gagan Sheik where they took their stand. The Namasudras attacked and several of their number opened fire. Three Mahomedans, viz., Daliluddi, Karim and Kanai were shot dead. Nine others, viz., Emani Sheikh, Hazari, Sultan, Dhala, Alfu, Mokshed, Abdul Aziz Molla, Tofazzel Fakir and Abdul Majid Molla also received gun-shot wounds and of these, Hazari and Emani subsequently died of their wounds. Other members of the Mahomedans party were injured by spears, daos, etc. The Namasudras dragged away the bodies of the three Mahomedans who were shot dead on the spot, and those bodies have not since been recovered.

The defence case seems to have been that Golak Tikadar was in possession of the disputed land; that the Mahomedans gathered to take forcible possession and drove the Namasudras to Ghanashyampur; and that friends of the Namasudras came up with guns to protect them, and in exercise of the right of private defence, shots were fired at the Mahomedans. Charges under S. 302, Penal Code, were framed against some of the accused, charges under S. 302/34, Penal Code, against some others, and charges under S. 302/149, Penal Code, against all the accused. In explaining the law regarding the charge under S. 302/149, Penal Code, the learned Judge observed:

"If accused 1 to 4 are found by you not to be guilty under S. 302, Penal Code, but found constructively guilty of it under S. 34, Penal Code, the other accused cannot be convicted under S. 302/149, Penal Code, as if by double construction."

and again,

"But as I have already stated at the outset, if you do not find accused 1 to 4 guilty under S. 302, Penal Code, accused 1, 2 and 4 to 6 guilty under S. 326, Penal Code, but guilty of murder or grievous hurt under S. 302 or S. 326 read with S. 34, Penal Code, you cannot find the other accused guilty under S. 302 or S. 326 read with S. 149, Penal Code."

Mr. N. K. Basu supported this interpretation of the law, and referred to the judgment of Field J. in 8 Cal. 739¹ in support of his argument. Field J. however merely observed:

"But it may be a question whether in this case Jhubboo, being thus constructively guilty of murder, could be said to have committed the offence of murder within the meaning of S. 149, so as to make the other prisoners by a double construction, guilty of

1. ('82) 8 Cal. 739; 12 C.L.R. 233, *Empress v. Jhubboo Mahton*.

^a murder. On these essential points, no direction whatever was given to the jury."

Thus it will be seen that Field J. did not purport to examine the question and decide the point of law, he merely expressed some doubt in the matter. In our opinion, if the relevant sections are examined and the underlying principles borne in mind, there can be no doubt that the learned Additional Sessions Judge's direction on this point was wrong. Section 149, Penal Code, reads:

^b "If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of the committing of that offence is a member of the same assembly, is guilty of that offence."

^c Section 9, Penal Code, provides that "unless the contrary appears from the context, words importing the singular number include the plural number, etc." Therefore, since the context does not suggest anything to the contrary, the opening words of S. 149, Penal Code, may be read as "If an offence is committed by any member or members of an unlawful assembly, etc." and the section itself will apply in terms to cases where the offence in question is committed not by a single individual but by several individuals acting in concert. Moreover, according to the definition of "offence" in S. 40 of the Code, the word "offence" as used in S. 149 denotes anything made punishable by the Code. Where a person becomes liable in respect of a criminal act done by him in furtherance of the common intention of himself and others and is punishable in respect of his part in the act he is himself guilty of an offence. The offence of which he may be guilty may be different from that of the others engaged along with him in the commission of the criminal act (S. 38) but it will nevertheless clearly be an offence within the meaning of the word as used in S. 149 of the Code.

^a From general principles also, it is difficult to understand why a member of an unlawful assembly should not be liable for an offence jointly committed by two or three members of the assembly if that offence was committed in prosecution of the common object of the assembly or was such as the members of the assembly knew to be likely to be committed in prosecution of the common object. To take an example, if in the course of a riot, a man is seized, flung over a cliff and killed, there seems to be no reason for making a distinction between the case where the victim was flung over the cliff by a single man, and the case where the victim was seized by several

men and flung over the cliff. The guilt of the members of the assembly who took no part in the flinging remains the same, and is determined solely by a consideration of the question whether the injury to the victim was committed in prosecution of the common object of the assembly or was such as the other members knew to be likely to be so committed. We are satisfied that S. 149, Penal Code, applies equally in cases where offences are committed by single members of the assembly and in cases where offences are committed by two or more members of the assembly acting in furtherance of a common intention. If an offence is committed, whether ^f by a single member of the assembly or by a group of members, the other members of the assembly may be liable under S. 149, Penal Code.

In view of Mr. Basu's argument, it will suffice to give one or two examples of the learned Judge's mistakes in placing the evidence before the jury; it will not be necessary to set them all out at length and shew the effect they must have had on the jury. For instance, it was common ground during the trial that the clash between the parties occurred somewhere about 5.30 p.m. or 6 p.m. The learned Judge repeatedly told the jury ^g that in the F. I. R. the complainant stated that the clash occurred about 4 p.m., and he asked the jury to draw a conclusion adverse to the prosecution. The complainant did not state in his F. I. R. that the clash occurred about 4 p.m. He stated that news was sent about 4 p.m., to the thana that the parties were preparing to fight and that the fight took place thereafter. The prosecution adhered to this case throughout. The learned Judge in addressing the jury, told them that they should first determine who was in possession of plot No. 1667 and he drew their attention to a statement of Jogendranath Mazumdar ^h in the petition of compromise in the partition suit to which I have referred above. The learned Judge omitted to point out that there was no evidence of possession by the accused party, and that the statement of Jogendranath Mazumdar, being a statement in his own interest, had practically no value, if it was admissible in evidence at all. The learned Judge drew the attention of the jury to an entry in the general diary of police station Therokhada to the effect that a constable named Mir Aminuddin had been deputed that afternoon to a place called Balordhona and to certain evidence on record shewing that in order to go to Balordhona from the thana, one would naturally go via Atlia. From this

^a the learned Judge asked the jury to draw the inference that this particular constable was a competent witness and had been withheld, and consequently to draw the further inference that if examined he would not have supported the prosecution version. In one place, the learned Judge went so far as to describe Mir Aminuddin as the most competent witness on certain points, though there was no evidence on record to shew that he was at all competent to depose in the matter.

^b The learned Judge placed certain arguments before the jury suggesting that the F. I. R. was lodged at a late stage and was antedated. He omitted to place any of the considerations before the jury which tended to shew that such a theory was untenable. The learned Judge then proceeded to assume, as though it had been positively proved that there had been such a delay in lodging F. I. R. and in taking the wounded to hospital—and asked the jury to draw inferences adverse to the prosecution therefrom. This was in spite of the fact that all the direct evidence on record was that there had been no such delay and the greater part of the circumstantial evidence was inconsistent with such delay.

^c Several dying declarations were recorded by a Magistrate. Two of the persons who made such declarations, died shortly after making them. The investigating officer deposed that the dying men also made statements to him before they died, and he gave the substance of those statements apparently from memory. The learned Judge drew the attention of the jury to an incorrect statement in the F. I. R. lodged by one of the accused persons, and then remarked :

“Curiously enough in all the dying declarations of the injured persons recorded by the Deputy Magistrate there was an echo of Debnath's incorrect statement”

^d and the learned Judge based his argument regarding the alleged antedating of the F. I. R. on this. As a matter of fact, there is nothing in any of the declarations recorded by the Magistrate to support this view. There was something in the evidence of the investigating officer as to what was said to him by the dying men, to support the argument; but this was comparatively unimportant as the investigating officer did not claim to have recorded the exact words and did not produce his own record of the statements, and as the learned Judge had already advised the jury not to believe the investigating officer that any statement by one at least of the dying men, had been made. On account of this supposed misstatement in the dying declarations recorded by

the Magistrate, the learned Judge told the jury that those declarations could not be acted on and had practically no value. These instances will suffice to shew how the evidence was misrepresented by the learned Judge. The instances could be multiplied. We are satisfied that the misrepresentations of fact were so numerous and so serious that they amounted to misdirection and that the misdirection caused the jury to return an erroneous verdict.

Mr. Carden Noad, appearing for the Crown, has argued that this Court is competent in appeal to review the evidence and if satisfied, to convict the respondents. We do not doubt that we have such power, but we consider that is eminently a case which ought to be decided by a jury on a proper trial and with proper directions from the Judge. We do not therefore propose to examine the evidence against each accused in detail. On the other hand, though we consider the verdict of the jury was erroneous owing to misdirections in the charge, we do not consider it necessary or desirable to order a retrial of all the respondents who have appeared before us. Bearing in mind that the occurrence took place nearly two years ago and that the appearing respondents have already been tried twice for this offence, and bearing in mind also the period they have been in custody since this appeal was admitted, we do not consider that the ends of justice require that the mere rank and file of rioters—those whose liability under S. 302/149, Penal Code, or S. 326/149, Penal Code, may be doubted—should be retried.

In considering this aspect of the case, Mr. Carden Noad pointed out very fairly that though some of the Namasudras were armed with guns and though some of the Mahomedans were shot dead yet according to some of the prosecution witnesses, the latter even did not think the guns would be fired. Mr. Carden Noad conceded that the Namasudras who were not armed with guns, might reasonably have thought that the guns were there merely to overawe their opponents and would not be used: Consequently many of the Namasudras may not have known at first that murder was likely to be committed in prosecution of the common object. But, Mr. Carden Noad proceeded to argue, after three of the Mahomedans had been shot dead, the Namasudras advanced and attacked the others: all who remained in the unlawful assembly after the first shots were fired may reasonably be presumed to have known that murder was likely to be committed in prose-

cution of the common object of the assembly. We have borne these arguments in mind, and are of opinion that there is good ground for ordering a retrial of all those appearing respondents who were armed with guns, or who were alleged to have performed such overt acts as stabbing the wounded or dragging away the dead or dying Mahomedans. But there is no sufficient cause for ordering a retrial of those appearing respondents to whom no specific acts were assigned and whose liability is based merely on their alleged identification as members of the unlawful assembly. Where the evidence merely shews that a particular accused was recognised as one of the assembly, there is nothing to shew that he continued as a member after firing was opened; and obviously it is too late now for the witnesses to remember with any accuracy at what stage of the proceedings they recognised particular accused persons. In this view we propose to allow the appeal but to direct a retrial of some only of the appearing respondents.

We desire also to make some observations to the procedure which we think should be adopted in the retrial. Where a person is said to have been killed and his body taken away and destroyed by his murderers there is ample justification for framing charges under s. 302 and under s. 201, Penal Code. But where in addition to the allegation that some victims have been murdered and their bodies removed, there is clear evidence that others have been murdered whose bodies have not been removed and destroyed, no useful purpose is served by framing charges under ss. 201 and 302 in respect of the persons whose bodies have been removed. The framing of a large number of charges serves merely to confuse the jury, and the offence of murder is satisfactorily established if the murder of one out of a number of victims is proved. In our opinion, the Judge who may preside over the new trial would be well advised to take up only the charges under s. 148, Penal Code, the charges under ss. 302, 302/34 and 302/149, Penal Code, in respect of those persons only who died subsequently and on whose bodies post mortem examination was held, and under ss. 326 and 326/34, Penal Code, and under ss. 326/149, Penal Code, in respect of those who survived and were able to depose.

It will be open to the Crown to give evidence that a particular accused person shot at and wounded those whose bodies are missing, that a particular accused person stabbed or otherwise assaulted those victims whether before or after their death, and that a parti-

cular accused person assisted in dragging away the bodies of the victims. These facts if proved would go far to shew that the particular accused persons knew that murder was likely to be committed. There will be no necessity in such a case to consider whether an offence under s. 201, Penal Code, has been committed, whether the victims were dead or alive when dragged away, or what would be the result if the jury were of opinion that some of the victims were already dead before spears transfixing them.

Again, we desire to point out that in the present case there is scarcely any need to explain to the jury the law regarding right of private defence. If the prosecution case is substantially true — if the battle took place on or near Gagan's land there can be no question of right of private defence. If on the other hand, the fight took place in Ghanashyampur, far from Gagan's land, the prosecution evidence as a whole must be substantially false and ought to be rejected in toto. In this latter view, the accused would be entitled to acquittal not on the ground of exercise of right of private defence (of which as yet there is no evidence) but on the ground that the prosecution case had not been satisfactorily proved.

In the result therefore we order that the appeal be allowed so far as the appearing respondents are concerned and the verdict of the jury concerning them and the acquittal of Parbati Biswas, Brajabashi Paramanik alias Choukidar, Debnath Tikadar, Bholanath Tikadar, Banamali Tikadar, Sambhu Tikadar, Ganesh Tikadar, Dagaram Tikadar, Bhupendranath alias Nedu Tikadar, Radhanath Tikadar, Rash Bihari alias Bihari alias Tena Tikadar, Kunja Bihari Tikadar, Jharu Paramanik, Sakhi Charan Paramanik, Jaladhar Malakar, Ganesh Chandra Mazumdar alias Majhi, Nilkamal Mandal, Radhanath Gain alias Mallik, Sakhi Charan Gain alias Mallik, Umesh Sarkar, Hazari Gain alias Mallik, Ananta Kumar Hira Motilal Bagdi, Ballak Tikadar, Kushai Mandal alias Biswas, Kshetra Mondal alias Biswas, Upendranath Mondal alias Biswas, Umesh Mondal, Fatik Mondal, Kalachand Mandal, Sarat Chandra Sarkar, Manindra Kumar Sardar alias Ray, Purosottam Ray, Nayan Chandra Sardar alias Biswas, Atul Bairagi, Narottam Poddar alias Ray, Kailash Bairagi, Nakul Bairagi, Sarat Bairagi, and Nagendra Bairagi be set aside and we further direct that Parbati Biswas, Brajabashi Paramanik alias Choukidar, Debnath Tikadar and Bholanath Tikadar and Banomali Tikadar be retried by some

- a Judge other than the Judge whose order we have set aside. These five accused will remain in custody pending retrial; the remaining accused whose acquittals we have set aside, will be released from custody.

Roxburgh J. — I agree.

G.N.

Order accordingly.

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B. K. MUKHERJEA AND SHARPE JJ.

Anil Kumar Basu — Judgment-debtor —
Appellant

v.

- b Roy Biman Behari Mitra for self and executor to Estate of Roy Banku Behari Mitra and others — Respondents.

Appeal No. 210 of 1942, Decided on 8th February 1944, from appellate order of Dist. Judge, Khulna, D/- 11th May 1942.

(a) Bengal Tenancy Act (8 of 1885), S. 168A (1) (a)—Effect of—Rent decree—Decree-holder can execute decree by attaching under O. 21, R. 53, Civil P. C., decree obtained by judgment-debtor against decree-holder — S. 168A (1) (a) is no bar.

- c Under S. 168-A (1) (a) all that is prohibited in execution of a rent decree is the attachment and sale of any property moveable or immovable belonging to the judgment-debtor other than the tenure in arrears. The language of the section does not bar any other form of execution available to the decree-holder under law, by which he can attempt to realise the decretal dues without attaching and putting up to sale any property of the judgment-debtor except the defaulting tenure. Section 51, Civil P. C., enumerates the various ways in which the Court may order execution of a decree according as the nature of the relief granted may require, and save and except the limitation imposed by S. 168A (1) (a) mentioned above it is for the decree-holder to choose in which of the several modes specified in the section he would execute the decree. Section 168A (1) (a) prohibits only attachment and sale of any property other than the tenure in arrears. An attachment comes within the prohibition of the section only so far as it is a necessary step to the sale of the property. A mere attachment without sale of the property does not come within the purview of S. 168A. Consequently it is open to the decree-holder to attach in execution of his rent decree under O. 21, R. 53, Civil P. C., decrees obtained by the judgment-debtor against him. Such a proceeding does not involve sale of any property belonging to the judgment-debtor and therefore is not hit by S. 168A (1) (a). [P 240h; P 241a,d,e]

(b) Interpretation of statutes—Clear language must be given effect to even though consequences are such as could not have been contemplated by Legislature.

In construing an Act the Court of law has got to ascertain the intention of the Legislature from what the latter has chosen to enact either in express words or by reasonable and necessary implication; and a judicial tribunal is bound to give effect to the clear language used in a statute even though it is of opinion that the consequences are not such as could have been contemplated by the Legislature.

[P 241b,c]

C. P. C. —

(44) Chitaley, Preamble N. 7. Pt. 11.

Gopendra Nath Das and Jagadish Chandra Ghose — for Appellant.

Ramaprasad Mukherji and Joygopal Ghose —
for Respondents.

B. K. Mukherjea J.—There is no dispute about the facts of this case which lie within a very short compass. The respondents before us Roy Biman Behari Mitra and others obtained a rent decree against the appellant and his cosharers in respect of a tenure for a sum of about Rs. 2000. The appellant on the other hand, obtained rent decrees against the respondents in 24 rent suits for various sums of money aggregating to about Rs. 1700. The respondents in execution of the decree obtained by them, attached the 24 rent decrees passed against them in favour of the appellant under O. 21, R. 53, Civil P. C. The appellant thereupon preferred objections under S. 47, Civil P. C., contending inter alia that under S. 168A, Ben. Ten. Act, the only remedy of the decree-holders was to proceed against the tenure in arrears and they were incapable of attaching any other property belonging to the judgment-debtor. The whole controversy thus centred round the point as to whether the proceedings in execution started by the respondents under O. 21, R. 53, Civil P. C., were barred under the provisions of S. 168A (i) (a), Ben. Ten. Act. The trial Court answered this question in favour of the judgment-debtor. The lower appellate Court has held against him. He has now come up on second appeal to this Court.

Having heard the learned advocates on both sides, we have come to the conclusion that the provisions of cl. (a) of S. 168A (i), Ben. Ten. Act, do not stand in the way of application for execution started by the respondents decree-holders. This clause provides that a decree for arrears of rent shall not be executed by attachment and sale of any moveable or immovable property other than the entire tenure or holding to which the decree relates. Thus all that is prohibited in execution of a rent decree is the attachment and sale of any property moveable or immovable belonging to the judgment-debtor other than the tenure in arrears. The language of the section does not bar any other form of execution, available to the decree-holder under law, by which he can attempt to realise the decretal dues without attaching and putting up to sale any property of the judgment-debtor except the defaulting tenure. Section 51, Civil P. C., enumerates the various ways in which the Court may order execution of a decree according as the nature of the relief

granted may require, and save and except the limitation imposed by S. 168A (i) (a) mentioned above it is for the decree-holder to choose in which of the several modes specified in the section he would execute the decree. In the case before us, the decree-holders are not seeking to attach and sell any moveable or immovable property belonging to the judgment-debtor other than the defaulting tenure and what they have applied for is to attach certain decrees, which the judgment-debtor obtained against them, under O. 21, R. 53, Civil P. C., and realise the dues covered by them as representatives of the judgment-debtor in the manner contemplated by law. Whether they can as representatives of the judgment-debtor execute a decree which the latter obtained against them is a question which has not been raised before us and upon that we do not desire to express any opinion. But the proceeding certainly does not contravene the provisions of S. 168A (i) (a), Ben. Ten. Act.

It is a settled principle of construction that in construing an Act, the Court of law has got to ascertain the intention of the Legislature from what the latter has chosen to enact either in express words or by reasonable and necessary implication; and a judicial tribunal is bound to give effect to the clear language used in a statute even though it is of opinion that the consequences are not such as could have been contemplated by the Legislature. It may be argued that the intention of the Legislature in enacting S. 168A, Ben. Ten. Act, was to exonerate a tenant from any personal liability under a rent decree but it has not said so in proper language, nor are there any words in the section which show that the only form of execution which is available to the decree-holder is to attach and sell the defaulting tenure and nothing else. The section is an encroachment upon the rights which the landlord decree-holder had under the ordinary law and certainly it cannot be extended beyond what is warranted by the actual language of the section. Mr. Das has argued that the section prohibits not only attachment and sale of any property other than the tenure in arrears but even an attachment without sale comes within the prohibition and he invites us to construe the word "and" coming between "attachment" and "sale" as "or." We do not think that this contention is sound. The intention of the Legislature was obviously to prevent the sale of any property belonging to the judgment-debtor other than the tenure in execution of a rent decree. An attachment comes within the prohibition of

the section only so far as it is a necessary step to the sale of the property. The words have been taken verbatim from S. 51, cl. (b), Civil P. C., and it seems to us that the latter part of the clause was not reproduced in S. 168A, Ben. Ten. Act, probably because no question of sale of any property without attachment can possibly arise when a rent decree is being executed. We do not think that a mere attachment without sale of the property does at all come within the purview of S. 168A, Ben. Ten. Act, and as the proceeding started by the decree-holders does not involve sale of any property belonging to the judgment-debtor we are of opinion that it is not hit by S. 168A. The result therefore is that we affirm the decision of the Court of appeal below and dismiss this appeal. We make no order as to costs. No order is necessary in the connected rule.

Sharpe J.—I agree.

G.N.

Appeal dismissed.

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NASIM ALI AND RAU JJ.

Mahendra Nath Surul and another —
Appellants

v.

Netai Charan Ghosh and others —
Objectors — Respondents.

Appeal No. 191 of 1941, Decided on 22nd December 1942, from original decree of District Judge, Hooghly, in Suit No. 7 of 1940, D/- 23rd April 1941.

(a) Evidence Act (1872), S. 90—Will — S. 90 applies — Presumption is not obligatory — If Court does make presumption, proof under S. 69 is not necessary.

Section 90 does apply to wills as much as to other documents. The presumption mentioned in S. 90 is however not obligatory: the Court may or may not make it according to the circumstances of the case. Where some of the attesting witnesses are alive and the proponent of the will omits to examine them, the Court may prefer to make the presumption mentioned in S. 114, illus. (g) rather than the one in S. 90. The proponent may also be hit by the provisions of S. 68. But where the Court chooses to make the presumption authorized by S. 90, no further proof of the facts is necessary under S. 69: ('16) 3 A. I. R. 1916 Cal. 938, *Disting.*; ('27) 14 A. I. R. 1927 Cal. 102, *Rel. on.* [P 242g,h; P 243a]

(b) Succession Act (1925), S. 63—Attestation.

The mere affixing of a mark will not suffice for attestation. [P 242b]

Gopendra Nath Das and Narendra Nath Choudhury — for Appellants.

Bhagirath Chandra Das — for Respondents.

Rau J.—This is an appeal from the judgment of the District Judge of Hooghly refusing to grant letters of administration to the appellants with a copy of the will said to have been executed by one Madhab Chandra Mondal. The will purports to have been exe-

a cuted as long ago as 1871 and was registered before the Sub-Registrar of Hooghly on 17th July 1871. The executors named in the will and the attesting witnesses are, as may be expected, all dead. The applicants for the grant are the sons of Jadu Nath Surul, who was a son of the testator's sister and was one of the legatees under the will. The objectors are the sons of Kali Charan Ghosh, who was the son of the testator's daughter and was the residuary legatee. The District Judge has found that the will was not properly attested as required by S. 63, Succession Act, 1925 and has therefore refused the grant. Hence this b appeal by the proponents of the will.

The only issue argued before us is whether there was proper attestation. Undoubtedly, S. 63 of the Act, requires that an attesting witness to a will must sign the will in the presence of the testator and the context makes it clear that the mere affixing of a mark will not suffice for attestation. Such was also the law when the will in question was made (1871). The District Judge finds that in this case all the attesting witnesses were illiterate and merely affixed their marks, so that the attestation was on the face of it invalid.

c We have examined the original will carefully and have come to the conclusion that there is no satisfactory basis for this finding. There are no fewer than six attesting witnesses; there is no direct evidence that any of them were illiterate and it would be rather strange if the testator, who had sufficient circumsppection to register the will, selected for his attesting witnesses six persons all of whom were illiterate and unable to sign their own names. The will itself was written by one Behari Ghoshal who died about 30 years ago (see the evidence of P. W. 2); but it does not follow that he wrote the names of the witnesses also. Indeed, the formation of the Sri prefixed to the names of the first two witnesses is so different from that of the Sri prefixed to the names of the last four that they could not all have been written by the same man. Again, in at least four of the six names it is not possible to say whether the apparent "mark" is really a "mark" or merely a flourish at the end of the signature; certainly in the case of the first name, the same person that signed it also made what looks like a cross at the end without lifting the pen. It is also not without significance that in no case is there any such word as bakalam to indicate that the signature of the witness was by the pen of somebody else. In these circumstances, d it may properly be said that the signatures

purport to be in the handwriting of the witnesses themselves.

This being the state of the evidence, the question arises whether S. 90, Evidence Act, does or does not apply to the case. The will was undoubtedly made more than 30 years ago—in fact more than 70 years ago and it has been produced from the proper custody. There is nothing in the terms of the section to limit its application to non-testamentary documents; but our attention has been called to the decision in 23 C. L. J. 82¹ at p. 83, where this Court observed that the rule laid down in the section did not apply to proof of a will in the Probate Court. The learned Judges went on, however, to point out that in any event the rule was merely discretionary, since the section says "the Court may presume" and that in that particular case there were other circumstances to show that the will was not genuine. Evidently therefore the observation that the rule did not apply (even as a matter of discretion) to proof of wills was obiter, and it appears to have been treated as such in a subsequent case in this Court, 31 C. W. N. 215² at p. 218, where it was held that the section does apply to wills as much as to other documents. The only ground given for the observation to the contrary in the earlier decision is that if the section were applicable to wills, it would become unnecessary to prove wills executed more than 30 years before the testator's death, even where some of the subscribing witnesses might be alive. This does not necessarily follow; the presumption mentioned in S. 90 is not obligatory: the Court may or may not make it according to the circumstances of the case. Where some of the attesting witnesses are alive and the proponent of the will omits to examine them, the Court may prefer to make the presumption mentioned in S. 114, illus. (g) rather than the one in S. 90. The proponent may also be hit by the provisions of S. 68.

For these reasons we have no hesitation in holding, as was held in 31 C. W. N. 215,² that S. 90 according to its plain terms applies to wills as to other documents. There are no suspicious circumstances in the present case; on the contrary the fact that the will was duly registered after it had been executed removes any ground for suspicion. We are therefore prepared to make the presumption permitted by the section and to hold that the

1. ('16) 3 A. I. R. 1916 Cal. 938 : 33 I. C. 273 : 23 C. L. J. 82, Shyam Lal v. Rameswari.

2. ('27) 14 A. I. R. 1927 Cal. 102 : 98 I. C. 147 : 31 C. W. N. 215, Gobinda Chandra Pal v. Pulin Behary.

a signatures of at least four of the attesting witnesses were in their own handwriting and that the will was duly executed and attested. Having regard to the definition of the words "may presume" in S. 4, we think it clear that where the Court chooses to make the presumption authorized by S. 90, no further proof of the facts is necessary under S. 69. We regard them as proved.

We accordingly allow the appeal and direct that the appellants be granted letters of administration with a copy of the will annexed. As to costs, we notice that the father of the appellants although one of the attesting witnesses and therefore necessarily aware of the existence of the will, omitted to apply for letters of administration. If he had applied the present contest might not have arisen. We therefore direct that each party bear its own costs in this Court as well as in the Court below.

R.K.

*Appeal allowed.***A. I. R. (31) 1944 Calcutta 243**

KHUNDKAR AND SEN JJ.

Ahmed Mia and others — Appellants

v.

Emperor.

c Criminal Appeal No. 501 of 1942, Decided on 3rd May 1943, from the judgment of Addl. Sessions Judge, Chittagong.

(a) Criminal P. C. (1898), Ss. 172 and 162 — Court can look into diary of counter case and use it in the way laid down in S. 172 (2).

Section 172 relates to the Police diary made in respect of a case under enquiry or trial by the Court which calls for it and therefore does not in terms apply where the diary relates not to the case which was actually being tried by the Court but to the counter case, but the principles set out in the section apply. There is no provision in the Criminal Procedure Code which would prevent the Court from looking into the diary of the counter case, or from using the diary in the counter case in the way laid down in S. 172 (2). [F 244c,d]

Cr. P. C. —

('41) Chitaley S. 172 N. 2, N. 4.

(b) Criminal P. C. (1898), S. 172—Diary kept under — Mode in which it may be used (Per *Khundkar J.*).

No doubt a diary kept under S. 172 cannot, in any circumstances, be used as evidence of any date, fact or statement contained therein, but it can be used for the purpose of assisting the Court in the enquiry or trial by enabling the Court to discover means for further elucidation of points which need clearing up before justice can be done: ('17) 4 A. I. R. 1917 P. C. 25 and 19 All. 390 (F. B.), *Rel. on.* [P 244h; P 246a]

Cr. P. C. —

('41) Chitaley, S. 172 Notes 4 & 6.

('41) Mitra, Page 553, N. 538.

*Nirmal Chandra Chakravarti and Ramaprasanna Bagchi — for Appellants.**Nirmal Kumar Sen — for the Crown.*

Sen J. — Six persons, namely, Ahmed e Mia, Abul Kashem, Nurus Safa alias Ahmed Sofa, Syedar Rahaman, Ali Mullah and Khalilur Rahaman were sent up for trial charged under various sections of the Penal Code. They were tried by the Additional Sessions Judge of Chittagong and a jury and they were all convicted under various sections of the Penal Code. Five of the appellants have appealed. They are the first five named above. The case against the appellants may, briefly, be stated thus: Amir Hossain and certain other persons claimed to have a right of way over a certain path leading to a tank. They alleged that the accused f obstructed that pathway by erecting a bamboo fencing. When they went to remove that fencing, the accused and others assaulted them as a result of which one Ahmed Mia was killed. The defence taken broadly may be stated thus: Amir Hossain and his party were attempting to carve out a pathway over land belonging to the appellants. They trespassed into the homestead portion of the appellants' land and there was a mutual fight in the course of which persons of both parties got injured.

It appears that the same investigating officer conducted the enquiry with respect to g the allegations of both parties and Amir Hossain and others were tried in a counter case. It is clear from this brief statement of the facts of the case that the investigating officer who went on the scene very shortly after the occurrence was perhaps the most important witness in the case. He gave evidence in the Sessions trial. The appellants requested the Court by a petition to direct the investigating officer to come with the police diary of the counter case, so that he may be contradicted, if necessary, as regards his statements as to what he saw at the time of his investigation by reference to his own h record of what he saw in the police diary. The learned Judge rejected the petition stating that S. 162, Criminal P. C., rendered such a statement inadmissible in evidence.

In our judgment, the learned Judge was wrong in refusing this prayer of the accused. Section 162, Criminal P. C., has nothing whatsoever to do with this matter. That section relates to statements made by persons to police officers in the course of investigation. What the appellants were wanting to make use of was not a statement of a person to a police officer but a statement of the police officer recorded by himself in his diary. Not only was there no objection to the learned Judge calling for this police diary but we are

a of the opinion that in the particular circumstances of this case he should have called for this diary and satisfied himself by referring thereto that the evidence given by the investigating officer before him truly represented what the investigating officer saw. In the circumstances of this case, the investigating officer's evidence on this point was of vital importance and the learned Judge should have satisfied himself by looking into the diary that the investigating officer was relating accurately and truly what he saw at the place of occurrence. In this connexion, we would refer to S. 172, Criminal P. C. It is true that this section does not in terms apply,

b but it is useful because it indicates a principle which should guide the Courts in dealing with such police diaries. Section 172 (2) says: "Any criminal Court may send for the police diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial."

It goes on to say that neither the accused nor his agents shall be entitled to call for such diaries, or to see them merely because they are referred to by the Court; but if the diaries are used by the police officer who made them, to refresh his memory, or if the Court uses them for the purpose of contradicting the police officer the diaries would become evidence under S. 161 or S. 145, Evidence Act. We would point out that S. 172 relates to the police diary made in respect of a case under enquiry or trial by the Court which calls for it. In the present case the diary related not to the case which was actually being tried by the Court but to the counter case. For this reason we stated before that S. 172 does not in terms apply, but the principles there set out apply. We are not aware of any section which would prevent the Court from looking into the diary of the counter case, or from using the diary in the counter case in the way laid down in sub-s. (2) of S. 172, Criminal P. C., and we are of opinion that in this case the Court should have used the diary in that manner. True, this is a question of discretion but we are of opinion that the Court in failing to exercise its discretion properly committed a serious error and that by reason of this error the conviction of the appellants has been vitiated.

d We accordingly set aside the convictions and sentences passed on the appellants and direct that they be retried by the learned Sessions Judge himself or by some Judge other than Mr. P. C. Roy as the learned Sessions Judge may think fit. We would also direct that the learned Judge who tries this

case should call for the record of the counter case and go through the record for the purpose of doing justice in the present case. The appellants Abul Kasem, Sayed Ahmed alias Sayedur Rahaman and Ali Meah alias Ali Molla, if on bail, shall remain on the same bail and if they have not yet furnished bail they shall be released on their furnishing bail to the satisfaction of the District Magistrate.

Khundkar J.—I agree entirely. As my learned brother has pointed out, S. 172 does not in terms apply because it relates to the use of such diaries as have reference to a case under enquiry or trial in that Court which is called upon to look into those diaries. But this section embodies a principle which in my opinion extends to all such police diaries under S. 172 as may be of assistance in ascertaining the truth about any case which is at that time under investigation in any criminal Court whether they were made for that case or for a connected case. The only real question in the present case was where this riot took place. The investigating Sub-Inspector deposed that when he visited the spot, he saw signs which indicated that it had occurred at a particular place. This very investigating officer conducted an investigation into a counter case, which arose out of the same occurrence and it is alleged that in connexion with that other investigation he had recorded in the diary which he kept under S. 172, certain statements as to what he himself had observed when he visited the spot. It would seem to have been the case for the defence that what the Sub-Inspector had recorded in his diary under S. 172 in the counter case actually contradicted his evidence in the present case, and that the diary in question would have supported the contention advanced on behalf of the defence that the occurrence had taken place at another spot which was on land belonging to the accused persons. In these circumstances, I am definitely of the opinion that the learned trial Judge should, in the exercise of his judicial discretion, have sent for the diary kept by the investigating police officer under S. 172 in connexion with the investigation of the counter case, and that when that diary arrived the learned trial Judge should have proceeded to use it in the manner indicated in sub-s. (2) of section 172.

It is very true that a diary kept under S. 172 cannot in any circumstances be used as evidence of any date, fact or statement contained therein, but I am of the opinion that it can be used for the purpose of assisting the Court

a in the enquiry or trial by enabling the Court to discover means for further elucidation of points which need clearing up before justice can be done. See in this connexion the case in 44 Cal. 876¹ at p. 888 and the case in 19 ALL. 390.² As my learned brother has pointed out, there is nothing in the law which precludes a Court from sending for a diary kept under S. 172 and looking into it for such a purpose whether that diary relates to the case actually under enquiry or trial, or whether it relates to the investigation of a connected case.

G.N.

Retrial ordered.

- b 1. ('17) 4 A. I. R. 1917 P. C. 25: 39 I. C. 311: 18 Cr. L. J. 471: 44 Cal. 876: 44 I. A. 137: 13 N.L.R. 100 (P.C.), *Emperor v. Dal Singh*.
2. ('97) 19 All. 390: 1897 A. W. N. 174 (F. B.), *Queen-Empress v. Mannu*.

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EDGLEY J.

Meherdi Munshi — Plaintiff —
Appellant

v.

Inspector, Co-operative Societies, Goalpara circle and Ex-officio liquidator, Tiamari Janahari Manohari Goalia Bank under liquidation —

Defendant — Respondent.

c Appeal No. 460 of 1940, Decided on 2nd February 1943, from appellate decree of Addl. Sub-Judge, Assam Valley Districts at Dhubri, D/- 26th August 1939.

Co-operative Societies Act (1912), Ss. 42 (6), 42 (2) (b) and S. 43, Rules under, framed by Assam Government, R. 41—Effect of S. 42 (6) — Order for contribution under S. 42 (2) (b) made by liquidator—R. 41 not complied with—Civil Court has no jurisdiction to entertain suit questioning validity of order.

d Section 42 (6) presupposes a valid and proper dissolution of a society in accordance with the terms of the Act and therefore a civil Court may have jurisdiction to interfere with an order made by a liquidator if it could be shown that the society in question had not been validly dissolved. But when the requisite formalities set forth in S. 39 of the Act in connexion with the dissolution of the society have been complied with, S. 42 (6) ousts the jurisdiction of the civil Court with regard to the proceedings taken by the liquidator after an order for the dissolution of the society has been made. If any person has a grievance with regard to any of the matters mentioned in R. 41 it is open to him to move the Registrar in the matter and that official has power under Rule 42 to modify or reverse an order made by the liquidator under R. 41. No further remedy is provided either by the rules or by the statute. Consequently the civil Court has no jurisdiction to entertain a suit to question the validity of an order for contribution made by the liquidator under S. 42 (2) (b) merely on the ground that the provisions of R. 41 were not complied with: ('18) 5 A. I. R. 1918 All. 419 and ('20) 7 A. I. R. 1920 Bom. 62, *Rel. on*; ('37) 24 A. I. R. 1937 Lah.

931, *Dissent.*; 41 C. W. N. 670 and ('34) 21 A. I. R. 1934 Cal. 23, *Expl.* [P 246f,g; P 247a]

Amarendra Mohan Mitra and Tarun Kumar Dhar — for Appellant.

Santosh Nath Sen — for Respondent.

Judgment. — The plaintiff is the appellant in this case and the appeal arises with reference to a suit brought by the plaintiff for a declaration that an order of contribution made by the liquidator of a certain co-operative banking society was null and void. The order in question purported to have been made under the provisions of S. 42 (2) (b), Co-operative Societies Act and was in respect of the sum of Rs. 261-7-0. The plaintiff's case was to the effect that there had been no proper compliance with the rules framed by the Government of Assam under S. 43 of the Act as no proper enquiry had been held and no evidence was taken by the liquidator before the issue of the order.

The suit was defended by the Inspector of Co-operative Societies, Goalpara, who had been appointed as liquidator of the society under the provisions of S. 42 (1), Co-operative Societies Act. His case was to the effect that the suit was not maintainable, that it was barred by limitation and that contribution order had been legally made. Both the Courts below decided that the liquidator's order was legal and, further, the lower appellate Court held that the plaintiff's suit was barred by limitation. It is, however, admitted in this Court that no question of limitation can possibly arise.

The learned advocate for the respondent has put forward a preliminary objection to the effect that the civil Courts have no jurisdiction to deal with this matter having regard to the provisions of S. 42 (6), Co-operative Societies Act. The learned Munsif dealt with this point and considered that he was bound by a decision of S. K. Ghose J., in 41 C.W.N. 670¹ and he held that the civil Court had jurisdiction to entertain the plaintiff's suit. This point was not discussed in the judgment of the learned Subordinate Judge. Section 42 (6), Co-operative Societies Act on which the learned advocate for the respondent relies is in the following terms:

"Save in so far as is hereinbefore expressly provided, no civil Court shall have any jurisdiction in respect of any matter connected with the dissolution of a registered society under this Act."

The learned advocate for the appellant contends that this sub-section should not be held to be applicable in a case such as that with which we are now dealing because the

1. ('37) 41 C. W. N. 670, *Shillong (Assamiya) Co-operative Bank, Ltd. v. Chiniram Medhi*,

a plaintiff's case is to the effect that the liquidator had not held an enquiry as contemplated by the provisions of Rule 41 and in particular he has referred me to R. 41 (j) which requires the liquidator to keep short notes of the depositions of persons summoned to give evidence. It would appear, however, from cls. (e) and (f) of R. 41 that the liquidator has a discretion in the matter of summoning persons to give evidence and that the question of holding a semi-judicial enquiry would only arise in a case in which the liquidator did not think it necessary to make a summary order under cl. (e) of the rule.

b Even if it be assumed, however, that the provisions of R. 41 actually contemplate some sort of a semi-judicial enquiry by the liquidator before he makes a contribution order under S. 42 (2) (b), Co-operative Societies Act, the question which requires consideration is whether failure to comply with the provisions of the rules would in itself be sufficient to confer jurisdiction on the civil Court to entertain a suit the purpose of which was to question the validity of such an order. The learned advocate for the appellant relies on certain observations contained in *S. K. Ghose J.'s* judgment in 41 C. W. N. 670.¹ In that case,

c however, the learned Judge was dealing with an order which the Registrar of Co-operative Credit Societies had made with regard to a dispute under the provisions of a rule corresponding to R. 32 (7) of the present rules under S. 43 of the Act. This rule purported to give finality to a decision of the Registrar with reference to such a dispute. The learned Judge, however, had no occasion to consider the effect of S. 42 (6), Co-operative Societies Act. Another case on which the learned advocate relies is that in 37 C. W. N. 843.² That was also a case which fell under R. 22 (6), Bengal Government Rules which corresponds to rule

d 32 (7) of the Assam Rules to which reference has already been made. In the last cited case the learned Judges held that the civil Court had jurisdiction to entertain a suit in which the appointment of an arbitrator and the procedure adopted by him had been called into question. It would appear, however, from the judgment in that case that the basis of the decision was that the rule presupposed the valid appointment of an arbitrator. The plaintiffs had actually questioned the power to appoint the arbitrator and it followed that a question of jurisdiction was involved as, ac.

cording to the plaintiffs' case, an order made by a person who could not be legally appointed an arbitrator would be of no effect. The present case does not relate to an order made either by the Registrar or by an arbitrator under R. 32 (7). On the other hand, the order which has been called in question was one which was issued by a liquidator in connexion with the dissolution of a registered society.

In a case such as this it might possibly be argued that a civil Court has jurisdiction to interfere with an order made by a liquidator if it could be shown that the society in question had not been validly dissolved for it is clear that the language used by the Legislature in S. 42 (6) of the Act presupposes a valid and proper dissolution of a society in accordance with the terms of the Act. In the present case, it has not been contended that there was no compliance with the requisite formalities set forth in S. 39 in connexion with the dissolution of the society. On the other hand, the plaintiff's case is merely to the effect that, after the order of dissolution had been made, a defect in procedure occurred in connexion with the subsequent steps taken by the liquidator before a contribution order was made against the plaintiff. In my opinion, there can be no doubt that it was the intention of the Legislature to oust the jurisdiction of the civil Court with regard to the proceedings taken by a liquidator after an order for the dissolution of the society has been made. If any person has a grievance with regard to any of the matters mentioned in R. 41 it is open to him to move the Registrar in the matter and this official has power under R. 42 to modify or reverse an order made by the liquidator under R. 41. No further remedy is provided either by the rules or by the statute. Similar views have been expressed by the Allahabad High Court in 40 ALL. 89³ and by the Bombay High Court in 44 Bom. 582.⁴ A different view seems to have been taken by the Lahore High Court in A. I. R. 1937 Lah. 931,⁵ but in the latter case the learned Judges do not appear to have given full effect to the language which has been used by the Legislature in S. 42 (6) of

3. ('18) 5 A.I.R. 1918 All. 419 : 42 I. C. 968 : 40 All. 89 : 15 A. L. J. 863, Mathura Prasad v. Sheobalak Ram.

4. ('20) 7 A.I.R. 1920 Bom. 62 : 57 I. C. 423 : 44 Bom. 582 : 22 Bom. L. R. 732, Ganpat Ramrao v. Krishnadas Padmanabh.

5. ('37) 24 A.I.R. 1937 Lah. 931 : 175 I. C. 840 : 40 P. L. R. 422 : I. L. R. (1937) Lah. 649, Anjuman-i-Imdad Qarza Bahami Bafindagan Katra Hakimian, Amritsar v. Mehr Din.

2. ('34) 21 A.I.R. 1934 Cal. 23 : 149 I. C. 220 : 60 Cal. 1207 : 37 C. W. N. 843, Dacca Co-operative Industrial Union Ltd. v. Dacca Co-operative Sankha Silpa Samity, Ltd.

a the Act and I prefer to follow the views which had been previously adopted by the High Courts of Allahabad and Bombay.

In view of what I have stated above, I must hold that the civil Courts have no jurisdiction to entertain the plaintiff's suit. This appeal must, therefore, be dismissed on grounds other than those on which the judgment of the learned Subordinate Judge is based. I make no order with regard to costs. Leave to appeal under Cl. 15, Letters Patent, is refused.

G.N.

Appeal dismissed.

b **A. I. R. (31) 1944 Calcutta 247**

EDGLEY AND BISWAS JJ.

Province of Bengal—Petitioner

v.

Ram Chandra Bhotika and others —

Opposite Party.

Civil Rule No. 328 of 1941, Decided on 13th January 1942, for setting aside order of President Calcutta Improvement Tribunal, D/- 20th September 1940.

(a) Land Acquisition Act (1894), S. 18 (1)—Words "the matter" in S. 18 (1) — Meaning of —Reference to Court under S. 18 (1)—Scope of enquiry before Court.

c The words "require that *the matter* be referred by the Collector for the determination of the Court" in S. 18 (1) merely mean that the point on which the Collector's award is disputed may be referred to the Court at the instance of a claimant. When such a dispute has been referred to the Court, the scope of the enquiry before the Court should be limited within the bounds of the dispute which had actually arisen before the Collector. The Court has no power to consider anything beyond what has actually been referred to it : ('30) 17 A.I.R. 1930 P.C. 64, *Rel. on.*

[P 248b]

d Consequently where the valuation of the trees on the land acquired was given by the claimant as Rs. 1500 when the question of the valuation of the trees was first raised before the Collector and the Collector in his award gave Rs. 400 to the claimant in respect of the trees and the claimant in his application under S. 18 for reference to the Court stated that he should be paid Rupees 1500 as compensation for the trees the only matter which must be taken to have been referred for the determination of the Court would be whether the trees should be valued at Rs. 400 or at Rs. 1500 and the Court has no power to consider anything beyond what has been actually referred to it. It is not open to the Court to allow the claimant to amend his application after the matter had come before it so as to claim a larger amount than Rs. 1500 as compensation for the trees because the amendment will have the effect of placing before the Court for determination a matter which had not actually been referred to it within the meaning of S. 18 (1) : ('37) 24 A.I.R. 1937 Mad. 902, *Disting.*

[P 248c,d]

(b) Calcutta Improvement Act (5 of 1911), S. 71 (d) — Decision of Calcutta Improvement Tribunal — High Court in suitable case can interfere in revision under S. 115, Civil P. C.—Calcutta Improvement Appeals Act—Effect of.

The Calcutta Improvement Appeals Act, 18 of 1911 by allowing an appeal from certain decisions of the Calcutta Improvement Tribunal to the High Court has the effect of making the tribunal a Court subordinate to the High Court within the meaning of S. 115, Civil P. C., and therefore in a suitable case it is competent for the High Court to interfere in revision with a decision of the Calcutta Improvement Tribunal. [P 248h]

C. P. C. —

('44) Chitale, S. 115, N. 6.

('41) Mulla, Page 415 Note "Subordinate Court."

Panchanan Ghose and Jogesh Chandra Sinha
—for Petitioner.

Atul Chandra Gupta, Kushi Prasun Chatterjee,
Chandra Nath Mukherjee for Ramendra
Chandra Roy (for Deputy Registrar)—

for Opposite Party. f

Edgley J. — This rule is directed against the order of the President of the Calcutta Improvement Tribunal, dated 20th September 1940, in which he directed that compensation to the extent of Rs. 3650 should be paid by the Province of Bengal in respect of some trees which stood on a plot of land which was the subject-matter of certain acquisition proceedings.

On 13th July 1937, the opposite party filed a claim pursuant to a notice under S. 9, Land Acquisition Act. Therein no compensation was specifically claimed on account of trees or crops. On 28th July he filed another application in which he stated that the compensation payable in respect of the trees and crops on the acquired land would amount to Rs. 2800. The award of the Collector is dated 19th November 1937 and, according to this award, the sum of Rs. 400 was given to the claimant in respect of the trees standing on the land. We are not concerned with that part of the award, which related to compensation for land and buildings and was accepted by the claimant. Subsequently on 7th December 1937 an application was made to the Collector for reference to the Court under the provisions of S. 18, Land Acquisition Act, and at that stage h the claimant stated that he should be paid Rs. 1500 as compensation for the trees. After the matter had come before the Court, the claimant was allowed to amend his application and to claim compensation for the trees to the extent of Rs. 10,000 in place of the sum of Rs. 1500 which he had previously mentioned in his application dated 7th December 1937. The parties then adduced evidence before the tribunal and, after considering this evidence, the learned President came to the conclusion that the fair market value of the trees at the material time was Rs. 3650.

Mr. Ghose on behalf of the Province of Bengal contends that the tribunal had no jurisdiction to allow the claimant to amend

his application after the matter had come before the Court. In support of this argument the learned advocate places considerable reliance on the terms of S. 18, Land Acquisition Act. The material portion of this section reads as follows :

"Any person interested who has not accepted the award may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested."

One point that has to be determined in connexion with the interpretation of S. 18 (1), Land Acquisition Act, is what the Legislature really meant by the words 'require that the matter be referred by the Collector for the determination of the Court.' In my view, these words merely mean that the point on which the Collector's award is disputed may be referred to the Court at the instance of a claimant. When such a dispute has been referred to the Court, the scope of the enquiry before the Court should, I think, be limited within the bounds of the dispute which had actually arisen before the Collector. In this particular case when the question of the valuation of the trees was first raised before the Collector the valuation suggested by the claimant was Rs. 2800 but the amount claimed was subsequently limited at the instance of the claimant to Rs. 1500. It follows, therefore, that the only matter which was referred for the determination of the Court was whether the trees should be valued at Rs. 400 or at Rs. 1500 and, on the principles laid down by the Judicial Committee of the Privy Council in 57 Cal. 1148,¹ the Court had no power to consider anything beyond what had actually been referred to it. In these circumstances, I do not think that it was open to the Court to allow the claimant to amend his application after the matter had come before the tribunal, because the amendment had the effect of placing before the Court for determination a matter which had not actually been referred to it within the meaning of S. 18 (1), Land Acquisition Act.

Mr. Gupta for the opposite party places considerable reliance on a decision of the Madras High Court in I.L.R. (1938) Mad. 479.² That decision is, however, merely an autho-

ority for the proposition that, on a reference to the Court under S. 18, Land Acquisition Act, in a proper case the Court has jurisdiction to consider the effect of a valuation made on a different basis from that which had been adopted before the Collector. It appears that the case in 57 I. A. 100¹ had been cited before the learned Judges of the Madras High Court, but with regard to this case they pointed out that :

"As their Lordships said, once it is ascertained that the only objection taken is to the amount of compensation, that alone is the 'matter' referred, and the Court has no power to determine or consider anything beyond it. This, however, does not amount to a decision that, when an objection to the amount of compensation has been taken, the Court has no jurisdiction to work out the amount of compensation in a manner different from that which has been adopted in the statement of objections."

The case in I. L. R. (1938) Mad. 479² above cited is clearly distinguishable from that with which we are now dealing, and in my opinion is of no assistance to Mr. Gupta as there is no question in the present case of adopting a different basis of calculation in respect of the compensation awarded to the claimant for the trees standing on the acquired land.

Mr. Gupta, however, urges that, in any event, it is not competent for this Court to interfere in revision with the decision of the tribunal. In support of this argument he has referred us to S. 71 (d), Calcutta Improvement Act, 1911, which is to the effect that the award of the tribunal should be deemed to be the award of the Court under the said Land Acquisition Act, 1894, and "shall be final." It was, however, provided in the Calcutta Improvement (Appeals) Act, 1911, that certain decisions of the Calcutta Improvement Tribunal should be subject to an appeal to the High Court. Mr. Gupta's contention is that all decisions of the tribunal must be regarded as final except in so far as an appeal may be allowed under the provisions of the Calcutta Improvement (Appeals) Act, (Act 18 of 1911), and, according to him, it would follow that, as no appeal lies in the present case, the decision of the tribunal is final and not subject to revision. I am not prepared to accept this argument, as it is clear that Act 18 of 1911 by allowing an appeal from the tribunal to the High Court had the effect of making the tribunal a Court subordinate to this Court within the meaning of S. 115, Civil P. C. It follows that in a suitable case it is competent for this Court to interfere in revision with a decision such as that with which we are now concerned. In my view, the tribunal acted beyond the scope of its jurisdiction

1. (30) 17 A.I.R. 1930 P.C. 64 : 121 I. C. 536 : 57 I. A. 100 : 57 Cal. 1148 (P. C.), *Pramathanath Mallik v. Secretary of State*.

2. (37) 24 A. I. R. 1937 Mad. 902 : 177 I. C. 140 : I. L. R. (1938) Mad. 479, *Revenue Divisional Officer, Vizagapatam v. Vyricherla Narayana Gajapatiraju*.

in allowing the claimant to amend his application by increasing his claim in respect of the trees to a figure far beyond that which he claimed at any stage before the Collector.

Mr. Ghose asks us to remand this matter to the Court below for further enquiry as to the correct valuation which in any event should not exceed the sum of Rs. 1500. We are, however, not prepared to direct a remand. Evidence was adduced before the Court below with regard to the valuation of the trees, and, in view of this fact and the circumstances of the case generally, we think it sufficient to direct that the claimant should receive compensation in respect of the trees to the extent of Rs. 1500. The rule is accordingly made absolute. The result is that the award of the Collector will be enhanced from Rs. 400 to Rs. 1500 with 15 per cent. statutory allowance, the whole of which will bear interest at the rate of 6 per cent. per annum from the date of the Collector's taking possession. The Province of Bengal will be entitled to their costs of this application to be realised from Mr. Gupta's client. The hearing-fee is assessed at three gold mohurs.

Biswas J. — I agree.

G.N. *Rule made absolute.*

A. I. R. (31) 1944 Calcutta 249

KHUNDKAR AND DAS JJ.

Emperor

v.

Kauser Ali Sk. s/o Kasem Sheikh and another — Accused.

Death Reference No. 11 of 1943 and Criminal Appeal No. 446 of 1943, Decided on 18th November 1943.

(a) Criminal P. C. (1898), S. 274 (2)—Out of eighteen jurors called nine attending—Out of nine one ill and another unable to attend—Jury of seven empanelled — Jury held constituted according to law.

Out of eighteen jurors called, only nine attended. Out of those nine one was too ill to sit and another sought exemption as he was engaged in testing of important war material and in the result seven persons were empanelled as the jury for the case it not being practicable in the circumstances for the Judge to empanel a jury consisting of nine persons:

Held that the jury was constituted in accordance with law: *Case law relied on.* [P 250a]

Cr. P. C. —

('41) Chitaley, S. 274, N. 4 Pt. 3.

('41) Mitra, Page 967 Note "Sections 274 and 326."

(b) Criminal trial — Evidence—Murder—Accused's being in company with deceased and other accused prior to murder though suspicious is insufficient to support conviction.

In a charge of murder the evidence that the accused was in the company of the deceased and the other accused up to some point of time prior to the 1944 C/32 & 33

murder does create great suspicion, but it is certainly not sufficient in law to establish the charge against the accused. [P 252d]

Penal Code —

('40) Ratanlal, Page 756 Note "Circumstantial evidence."

('36) Gour, Page 1027 Notes 3417, 3418.

(c) Criminal trial—Evidence—Co-accused—Retracted confession by accomplice attributing major part in crime to his companion—Evidentiary value.

A retracted confession by an accomplice attributing the major part in the crime to his companion is for all practical purposes of no value at all against a co-accused. [P 252e,f]

Cr. P. C. —

('41) Chitaley, S. 164 Notes 18, 19.

('41) Mitra, Page 521, N. 515.

(d) Criminal trial — Charge to jury — Retracted confession — Judge must point out to jury that conviction could be founded upon retracted confession.

Where a retracted confession is the only evidence in the case it is the duty of the Judge to point out to the jury that the only direct evidence in the case was that of the confession, that a retracted confession is not as strong as one which the accused adheres to, but that even so it is open to them if they believed the confession to found a conviction upon it. It should further be pointed out to them that the evidence of association of the accused in the crime before its commission and his conduct subsequent thereto, if they believed it was evidence which afforded some corroboration of the confession. Failure to do so vitiates the trial. [P 252h; P 253a]

Cr. P. C. —

('41) Chitaley, S. 297, N. 9 Pts. 30, 30a, 33; S. 164 N. 18.

('41) Mitra, Page 521, N. 515; Page 1020 N. (4).

Ashrafuddin Chowdhury and C. F. Ali — for Appellants 1 and 2, respectively.

Amiruddin Ahmed and Samarendra Nath Mukherjee (II) — for the Crown.

Khundkar J.—This is a reference under S. 374, Criminal P. C., for confirmation of the sentences of death passed upon the two accused Kauser Ali Sk. and Asmat (Ali) Mallik, who were convicted under S. 302/34, Penal Code. Along with the reference there is an appeal by the two condemned men. The verdict of the jury as against Kauser Ali Sk. was unanimous, but in the case of Asmat it was divided in the proportion of 5 to 2. Before saying anything about the merits of the case, a point of law raised on behalf of the appellants should be dealt with. Upon the order-sheet of the learned trial Judge the first entry under the date 9th August 1934 reads as follows:

"Owing to the paucity of Jurors, the trial commenced with seven Jurors. Out of eighteen Jurors called, only nine attended. Out of those nine one is too ill to sit and another gentleman, who is a Chemical Assistant in the Government Test House, Alipore, submits a letter from the Director, Government Test House, with the request to exempt the Assistant, as the Assistant is engaged in the testing of important

a war material. Thus, two gentlemen can't sit (one being ill.)"

The entry just quoted makes it clear that eighteen jurors were summoned for the trial, that nine attended, that out of these, two were unable to sit, and that in the result seven persons were empanelled as the jury for the case. As far as the record goes, it does not appear that it was practicable in the circumstances for the learned Judge to have empanelled a jury consisting of nine persons. It has nevertheless been argued on behalf of the appellants that the jury was not constituted in accordance with law. It seems to us that the point is covered by authority: see in this connexion the following cases, 34 C. W. N. 1127¹ at p. 1128; 61 Cal. 190² at p. 195; 62 Cal. 900³ and 47 C. W. N. 345.⁴ The case in 62 Cal. 900³ has been referred to with approval by the Judicial Committee of the Privy Council in 45 C. W. N. 269⁵ at p. 274. This point must accordingly be negatived.

The case for the prosecution very briefly stated was as follows: Accused 1 Kauser Ali Sk. had at one time been married to a niece of one Sona Sk. who is P. W. 10. After her death he married one Jamila Bibi who was an orphan living with her grand-mother Naju Bibi, P. W. 7, an old beggar woman. Kauser, who is a mill-hand, lived with Jamila in the cooly lines attached to a mill at Budge Budge. But there is some evidence that before the occurrence he used to spend his holidays in the house of P. W. 10 Sona Sk. Jamila whose age, according to the evidence, could not have exceeded 16, was in the habit of running away from Kauser and of going to stay with her grand-mother Naju Bibi. On Wednesday, the 3rd of March at or about 6 o'clock in the evening Kauser and Jamila together left their quarters in the cooly lines at Budge Budge, and there is evidence that Kauser said that he was taking his wife to Balarampore which is the village in which his relation Sona Sk. lives. At a spot not far from the cooly lines the pair were joined by accused 2 Asmat.

1. ('31) 18 A. I. R. 1931 Cal. 261: 128 I. C. 808: 32 Cr. L. J. 187: 34 C. W. N. 1127 (S. B.), Emperor v. Damullya Molla.

2. ('34) 21 A. I. R. 1934 Cal. 10: 155 I. C. 599: 36 Cr. L. J. 803: 61 Cal. 190, Mukunda Murari v. Emperor.

3. ('35) 22 A. I. R. 1935 Cal. 407: 156 I. C. 481: 36 Cr. L. J. 944: 62 Cal. 900: 39 C. W. N. 954 (S. B.), Emperor v. Benat Pramanik.

4. ('43) 30 A. I. R. 1943 Cal. 515: 206 I. C. 26: 44 Cr. L. J. 483: 77 C. L. J. 120: I. L. R. (1943) 1 Cal. 522: 47 C. W. N. 345, Emperor v. Kishori Khanra.

5. ('40) 27 A. I. R. 1940 P. C. 176: 190 I. C. 233: 41 Cr. L. J. 871: 45 C. W. N. 269: I. L. R. (1940) Lah. 612: I. L. R. (1940) Kar. P. C. 302: 67 I. A. 336 (P. C.), Mirza Akbar v. Emperor.

They proceeded to a place which, as far as the evidence goes, would seem to be on the way to Balarampore and not far from that place. This place has been variously described in the evidence as Nandanpur and Nandarampur. Here the party halted for a time, and the accused Asmat went away and procured toddy some of which was consumed by the accused Kauser. Thereafter the party entered a bamboo grove, which as far as we can ascertain from the evidence on the record lies in secluded spot. Here Asmat stabbed Jamila to death with a knife, while the husband Kauser stood by.

As against Kauser the case for the prosecution would indeed seem to be that he took an active part in the murder by holding his wife by the hands while Asmat was stabbing her. After the occurrence Kauser appeared at the house of his relation Sona Sk. where he complained of pains in the body, and said he wanted to lie down. As regards the movements of Asmat after the occurrence there is no evidence whatever. The body of the murdered girl was discovered on the following day when the police recorded an information of unnatural death, and took up the investigation. While the investigating officer was moving round searching for clues and for any information which would lead to the identification of the murdered girl, the accused Kauser entered into another marriage, his third wife being another niece of P. W. 10 Sona Sk. The marriage took place on Sunday, 7th March. In consequence of information which the police were able to obtain, both the accused were arrested on Tuesday, 9th March, and on the following Thursday, 11th March, the accused Kauser Ali made a confession before a Magistrate the material portion of which should here be set out :

"On Wednesday last at 6-30 or 7 in the evening I took my wife Jamila Bibi with me from the Budge Budge Cooly Lines to the Star Field at Budge Budge. Assak Mallik was sitting there. He came with us from there and coming through a swamp we reached Pokapari. Assak made us wait on the road and went away. Then he brought a Jhapa (earthen pot) of toddy and asked me to drink the same and he made me drink a glass of toddy. Thereafter he came from there taking us with him to the swamp at Balarampur and there he went to see a garden. Then he came back and took us to the garden. He stopped there suddenly and at this time my wife looked at me again and again. At this time Assak stabbed my wife on the back; my wife tried to clasp me and at this time I seized both of her hands and then Assak stabbed her further. Then my wife cried out 'babaray' (I'm finished) and fell down. Then Assak Mallik began to stab her and I fled away out of fear and I stood at a little distance.

Q.—Why did you take your wife to Assak Ali?

A.—I wanted to do another act (to take another wife) but he told me that I would not be happy to do

a another act (of marriage) so long as one (wife) was in existence and he asked me either to sell or to put an end to the one in existence. I told him that I would not be able to put an end to her (life). He asked me to bring her to him and he said that he would do the needful. So I brought her."

During the course of the investigation, the police were able to find some witnesses who were in a position to give evidence regarding the movements presumably on the date of the occurrence, of the two accused and the deceased woman between the time when they left the mill area, and that at which, according to the confession, the murder was committed. Prosecution witness 5 Dil Mohammad, a mill hand, b deposed that on a Wednesday, at about the time of the murder, he saw Kauser going out with his wife after 6 P. M. after the mill had been closed. He asked the accused where he was taking his wife, and the latter replied that he was taking her to Balarampur. Not far from the cooly lines there is a football ground which is called the Star Field. Prosecution witness 16 Anguri Bhusan Ghosh who is an A. R. P. Warden, deposed that at about dusk on 3rd or 4th March, he saw the accused Asmat sitting on the grass at the foot of a tree talking to another man. The witness was then talking to P. W. 17 Sital Banerjee who is also c an A. R. P. Warden. The two wardens were on the look out for bad characters who might be prone to commit theft during the alarm and confusion caused by air-raids, and the witness suspected that the two men might be thieves. He questioned them, and the accused Asmat replied that he was waiting for his cousin's husband who had gone to bring his wife. This witness further stated that the man to whom Asmat was talking went away, and that Asmat was then joined by the other accused, Kauser, who was accompanied by a girl aged about 15 or 16. The witness says that he saw this party of three persons going away d shortly afterwards in an easterly direction. Prosecution witness 17 Sital Banerjee corroborated the evidence of P.W. 16 Anguri Bhusan Ghosh.

The next witness who gave some evidence about the movements of the accused persons and the murdered girl was P. W. 18 Sk. Munshi who lives in Nandanpur. This witness deposed that about 7-30 P. M. upon some date which he does not specify, he saw the two accused, who were accompanied by a woman, standing somewhere in the village of Nandanpur or the village of Pokepari which is adjacent to Nandanpur. The witness flashed an electric torch on them. After two minutes the party of three went away. We would pause here to point out that the evidence of this witness has been

taken and recorded in the Sessions Court in a most unsatisfactory manner. It is not clear from the record whether when the witness flashed his torch upon this party of three persons, it was in the village of Pokepari or in the village of Nandanpur. Moreover, as I have just indicated, there is nothing in the record to show on what date this happened. The omission of any reference to the date or the approximate date, is an oversight which suggests a lack of proper attention either on the part of the Judge, or the Public Prosecutor, or both. It was assumed by the learned Judge in his summing up to the jury that this witness was referring to the evening of Wednesday 3rd March. The assumption is entirely unwarranted by what appears in the record of the evidence of P. W. 18 Sk. Munshi, and we trust that greater attention in future will be paid by this Judge and this Public Prosecutor to matters of importance to which the attention of witnesses should be called. If it was not possible for this witness to state the approximate date of the incident to which he was referring this fact should certainly have been brought out in his examination-in-chief. Assuming, as the learned Judge has assumed, that the evidence of P. W. 18 Sk. Munshi refers to an incident of 3rd March, we find that four g witnesses speak to the movements of the two accused and the deceased at a stage antecedent to the murder. Apart from the confession of Kauser there is no evidence to show when exactly Jamila Bibi met her death. The evidence of P. W. 10 Sona Sk. is as follows :

"On the date before my seeing the dead body, Kauser came to my house complaining of pains in his body and he wanted to lie down. It was night. I asked him to take tea. I can't say if he took food. He came to me at 8-30 P. M. on the date-before the date I saw the dead body. I can't say exactly on which day, i.e., Wednesday or Thursday, I saw the dead body. I think I saw that on Thursday."

Provided this witness is telling the truth, it h is reasonably clear that he is speaking of an event which occurred on the date of murder. Now, provided it is established that the evidence, to which I have already referred regarding the movements of the accused and the deceased woman before the murder took place, relates to the same date as that on which the murder was committed, and as that on which Kauser came to the house of Sona Sk. then it is clear that we have a more or less connected story of the movements of the accused Kauser both before and after the murder. The evidence shows that, accompanied by Asmat and his wife, he went to Nandanpur or Nandarampur which is on the way to Balarampur where P. W. 10 lives, in

a the evening of Wednesday 3rd March. It is equally clear that at 8-30 on that evening he appeared at the house of Sona Sk. in Balarampur unaccompanied by either Asmat or Jamila Bibi. The evidence of P. W. 10 Sona Sk. definitely suggests that Kauser was then suffering from something like shock, because he complained of pains in his body, and the witness thought it necessary to offer him a stimulant in the form of tea.

One defect in the trial out of which this appeal and this reference arise is that the exact date to which the evidence of witnesses Dil Mohammad, P. W. 5, Anguri Bhusan b Ghosh, P. W. 16, Sital Banerjee, P. W. 17 and and Sk. Munshi, P. W. 18 relates has not been clearly brought out in the evidence, and that the learned Judge in charging the jury seems to have assumed that the evidence must have related to what took place on the date when the murder was committed. All we can say is that, if it was impossible for these witnesses to give either the real or the approximate date, the learned Judge should have brought this fact, and its necessary implications to the notice of the jury in a prominent manner.

Assuming for purposes of argument that the evidence to which reference has just been c made does in fact relate to the movements of the two accused and the deceased on the date of the murder, it is necessary to consider the compartments into which all the evidence in the case falls and to see what portion of it may be regarded as substantive evidence, and what portion of it is merely evidence of corroboration. It is also necessary to examine with care the evidence which is really available against the accused Asmat in order to ensure that margin of safety which it is necessary to have for a conviction for a criminal offence. Regarding Asmat it is clear that the only evidence which really d connects him with the crime is the retracted confession of Kauser Ali. If that goes, then even the fact that he accompanied Kauser Ali and his wife from Budge Budge to Nandanpur on the day the murder was committed is consistent with Asmat's innocence. As has already been stated, there is no evidence at all regarding his movements on the night of 3rd March after 7-30 P.M. when he was seen by P. W. 18 Sk. Munshi. The evidence against Asmat, apart from the confession, amounts to no more than this, that he was in the company of the deceased and the other accused Kauser Ali up to some point of time prior to the murder. Evidence of this kind does create great suspicion, but it is certainly not sufficient in law to establish the

charge against this accused. We are left, therefore, with Kauser Ali's confession. It is the statement of a person who, upon his own showing, was an accomplice and who is anxious to attribute the major part in the crime to his companion. It is a retracted confession, and it has repeatedly been held that a retracted confession of this character is for all practical purposes of no value at all against a co-accused. Even if the evidence of association to which reference has already been made above could be regarded as corroboration of some part of the story which the confession contains, it certainly does not amount to substantial corroboration of particulars connecting the accused Asmat with the murder. In these circumstances we are satisfied that the conviction of Asmat being unsupported by evidence legally sufficient, cannot be upheld. We accordingly direct that he be acquitted and set at liberty forthwith.

The case against Kauser Ali stands on a different footing. Against him there is his own confession, which though it was retracted is nevertheless evidence which the jury were entitled to take into consideration. Further, as has been already indicated, the evidence regarding the movements of this accused upon the night when the murder must have been e committed can be regarded as some corroboration of the story contained in the confession. The evidence of his movements before the hour of 7-30 P.M. provided it can be shown to relate to 3rd March, shows that he left home accompanied by his wife and that he was with her when she was last seen alive. There is then a gap as to what happened, but the accused's own confession makes it clear that the murder was committed in this interval. The fact that he appeared in the village of Balarampur, unaccompanied by his wife and suffering from symptoms of shock, is not only consistent with the story in the confession, but goes some way to support it. As regards his subsequent conduct that also is consistent with the confession. After Wednesday 3rd March Jamila was missing. Kauser took no steps whatever to trace her, and displayed no interest in her whereabouts. Instead of that he married another wife on the following Sunday which was 7th March.

The evidence apart from that which relates to the date which is not clear has been placed before the jury with fairness. The learned Judge's summing up is in other respects sufficiently full and ample and yet in the special circumstances of this case, we are not sure that the jury were invited to approach the evidence from quite the proper angle. It

a should have been pointed out to them that the only direct evidence in the case was that of the confession, that a retracted confession is not as strong as one which the accused adheres to, but that even so it was open to them if they believed the confession to found a conviction upon it. It should further have been pointed out to them that the evidence of association up to the hour of 7-30 P.M. the conduct and movements of the accused after 8-30 P.M. on that evening and on subsequent days was, if they believed it, evidence which afforded some corroboration of the confession.

b The appeal of Kauser Ali must be allowed and he is directed to be retried according to law. The attention of the learned Judge who will hold the trial is directed to what has been stated regarding the evidence of P. Ws. 16, 17 and 18 with reference to the date of the incidents to which they deposed.

Das J.—I agree.

G.N.

Order accordingly.

A. I. R. (31) 1944 Calcutta 253

B. K. MUKHERJEA AND SHARPE JJ.

Sm. Malati Bala Deb Gupta—Petitioner
v.

c Narendra Chandra Bhattacharjee s/o
Bharat Chandra Bhattacharjee and
others — Opposite Party.

Civil Rule No. 1535 of 1942, Decided on 20th January 1944 issued from order of Dist. Judge, Tippera (Comilla), D/- 21st July 1942.

(a) Bengal Tenancy (8 of 1885, as amended by Act 6 of 1938), S. 26F — Application under S. 26F for pre-emption — Whether question of nature of tenancy can be gone into (*Quære*).

Whether the powers of the Court in dealing with an application under S. 26F are confined exclusively to matters specified in cls. (1) and (2) of S. 26F or whether the question relating to the nature of the tenancy can be gone into. [P 254f]

d (b) Bengal Tenancy Act (8 of 1885, as amended by Act 6 of 1938), Ss. 26F and S. 26C — Property described by purchaser in notice under S. 26C as occupancy holding — Application by cosharer tenants under S. 26F for pre-emption — Purchaser is estopped from denying that property is occupancy holding—Plea of estoppel when not tenable.

When a purchaser purchases a property which is specifically described as an occupancy holding and gives notice to the co-sharer tenants under S. 26C and on the faith of the representation contained in the notice that the property purchased is an occupancy holding the cosharer tenants apply for pre-emption under S. 26F and deposit the money which is required to be deposited under that section, a plea of estoppel may be legitimately taken by the pre-emptor against the purchaser and unless it is shown that the applicant for pre-emption had previous knowledge as to the real character of the tenancy the purchaser would be precluded from alleging or pro-

ving that the tenancy was of a nature different from what it was represented to be. A finding that the applicant pre-emptor's husband was cognisant of the entries in the settlement records which described the tenancies as residential tenancies is not sufficient for the purpose of negating the plea of estoppel because in the first place the knowledge of the husband is really not material; it must be proved and found as a fact that the pre-emptor herself was aware of the real state of affairs and in the second place the entries in the settlement record would at best raise a presumption and would not be conclusive and therefore when the husband states that he did not rely on the entries because they were incorrect it cannot be said definitely that he was aware that the holdings were not really occupancy holdings.

[P 254g,h; P 255a,b,c]

Hemendra Kumar Das—for Petitioner.

Dr. Basak, Upendra Kumar Roy and Abani Kanta Roy — for Opposite Party.

B. K. Mukherjea J.— This rule is directed against an appellate judgment of S. K. Sen Esq., District Judge of Tippera, dated 21st July 1942, affirming an order made by the Subordinate Judge, 2nd Court of that place by which he rejected an application presented by the petitioner under S. 26F, Bengal Tenancy Act. The material facts are not in controversy and may be shortly stated as follows: The lands in question are situated within the Brahmanberia Municipality and are included in two separate tenancies recorded under two separate khatians, one comprising C. S. plot 1335 and the other relating to C. S. dags 1336 and 1337. These lands were held originally by three brothers Kunja Kishore, Rajkishore and Krishnakishore, who had equal shares in them. The share of Rajkishore in both the tenancies passed by transfer to one Kalikishore Pal sometime in the year 1923 and on 28th November 1933, the one-third share of Krishnakishore in all these lands was sold by his heirs to the present petitioner Malatibala. The heirs of Kalikishore who got one-third share by purchase sold that share to Narendra Chandra Bhattacharjee, the opposite party No. 1, by a kobala which was executed on 14th July 1941. Notices of this transfer were given to all the cosharer tenants including the petitioner under S. 26C, Bengal Tenancy Act, and within two months from that date the petitioner presented this application for pre-emption of that share under S. 26F, Bengal Tenancy Act. The lands appertaining to the two tenancies have been described separately in the two schedules attached to the petition. The claim for pre-emption was resisted by the purchaser opposite party substantially on the ground that the tenancies in question related to homestead lands and consequently could not attract the provisions of S. 26F, Bengal Tenancy Act.

a The trial Court gave effect to this contention and rejected the application. On appeal the judgment has been affirmed and it is against this appellate judgment that the present rule has been obtained.

Mr. Das who appears in support of the rule has raised a two-fold contention. He has argued first of all that in an application under S. 26F, Bengal Tenancy Act, the Court can only proceed on the basis that the lands sold constituted an occupancy holding and the entire scope of the enquiry under the section is restricted to matters which are specified in cls. 1 and 2. The Court is not competent to
b investigate as to whether the nature of the tenancy is different from what is stated in the deed of conveyance or the notice that is issued under S. 26C, Bengal Tenancy Act, and no such question can be submitted for determination of the Court. The second point taken is that the transferee cannot go back upon the statements made in the notice of transfer as to the nature of the tenancy and he having invited the cosharer tenants to act on the statement cannot turn round and defeat the application for pre-emption by alleging that the tenancy purchased is of a different nature.

c In support of the first contention Mr. Das relied upon a decision of a Letters Patent Bench of this Court which is to be found reported in 46 C. W. N. 1022.¹ This was a case under S. 26F, Bengal Tenancy Act, as it stood prior to the recent amendment of 1938. Here a portion of a raiyati holding was sold by a tenant to the plaintiff respondent and the description in the kobala was that it was an occupancy holding. On notice being served upon the appellant landlord under S. 26C, Bengal Tenancy Act, the latter made an application for pre-emption under S. 26F as it then stood. This application was allowed and
d thereafter the respondent instituted a suit in the Court of the Munsif at Katwa for a declaration that the land purchased by her appertained to a mokarari holding and that the order of pre-emption made by the Court was void for want of jurisdiction. The first Court dismissed the suit. On appeal to the Court of the District Judge of Burdwan the appeal was allowed and the plaintiff's suit was decreed. This decision was affirmed by Sen J. on second appeal and by Nasim Ali J. and Blank J. on further appeal under cl. 15, Letters Patent. The decision of the Letters Patent Bench was that the order made in the

S. 26F proceeding did not operate as res judicata in the subsequent suit as the question relating to the nature of the tenancy could not be raised or decided in the proceeding under S. 26F, Ben. Ten. Act, the foundation of which was the admission of the purchaser in the purchase deed that the property sold was an occupancy holding. Dr. Basak appearing for the opposite party contended that since the above case was decided the provisions of S. 26F, Ben. Ten. Act have been amended by the amending Act of 1938 and cl. 10 of the present amended section gives a right of appeal from every decision made under that section. This, it is argued, shows that the proceeding f is no longer of a summary character and the enquiry is not restricted to the matters specified in cls. 1 and 2 of the section but embraces all questions of title which could be raised and decided in a suit. We do not think that the introduction of cl. 10 which gives a right of appeal is by itself sufficient to show that the intention of the Legislature was to extend the scope of enquiry under S. 26F, Ben. Ten. Act. We think however that it is not free from doubt as to whether the powers of the Court in dealing with an application under S. 26F, Ben. Ten. Act, are confined exclusively to matters specified in cls. 1 and 2. The judicial opinion is not quite uniform on this point. Mitter J. was against putting a rigid interpretation upon the section and he differed from the view taken by Henderson J. in several cases : *vide* 39 C. W. N. 1014.² It is not necessary for us to express any final opinion on this point for in our opinion the petitioner is entitled to succeed on the second point raised on her behalf.

It cannot be disputed that when a purchaser purchases a property which is specifically described as an occupancy holding and gives notice to the cosharer tenants under S. 26C, Ben. Ten. Act, and on the faith of the representation contained in the notice the cosharer tenants apply for pre-emption under S. 26F and deposit the money which is required to be deposited under that section, a plea of estoppel may be legitimately taken and unless it is shown that the applicant for pre-emption had previous knowledge as to the real character of the tenancy the purchaser would be precluded from alleging or proving that the tenancy was of a nature different from what it was represented to be. This view is supported by a decision of Mitter J. in 39 C. W. N. 1014² referred to above which follows an earlier decision of a Division Bench of this

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Court in 35 C. W. N. 114.³ The learned District Judge who heard the appeal in the present case has not disputed this proposition of law. What he has held, in substance, is, that in this case no estoppel can be pleaded against the purchaser as the petitioner or rather her husband was cognisant of the entries in the settlement records which described both the tenancies as residential tenancies. In our opinion these findings are not sufficient for the purpose of negating the plea of estoppel. In the first place the knowledge of the husband is really not material; it must be proved and found as a fact that the petitioner herself was aware of the real state of affairs. In the second place the entries in the settlement record would at best raise a presumption. It is not conclusive, and the petitioner's husband states in his deposition that he was indeed aware of the entries in the settlement records but he knew the settlement records to be incorrect. If having regard to the other circumstances and other evidence relating to these tenancies the petitioner's husband did not choose to attach any importance to the entries in the settlement records, we do not think that it can be held definitely that he was aware that the holdings were really (not?) occupancy holdings. The result is that in our opinion it has not been proved that the applicant for pre-emption was aware of the fact that the tenancies sold did not constitute occupancy holding, within the meaning of the Bengal Tenancy Act.

The result therefore is that the rule is made absolute. We set aside the order of the Courts below and direct that the matter should go back to the trial Judge in order that he might consider the question relating to sufficiency of the deposit made by the petitioner and dispose of the case in accordance with law. We make no order as to costs for this rule. Future costs will be in the discretion of the Court below. There will be no order for pre-emption with regard to that portion of the lands described in Sch. 2 which are comprised in the mokarari holding.

Sharpe J. — I agree.

G.N.

Rule made absolute.

3. ('31) 18 A. I. R. 1931 Cal. 483 : 131 I. C. 856 : 53 C. L. J. 414 : 35 C. W. N. 114, Surendra Nath v. Notan Behary.

A. I. R. (31) 1944 Calcutta 255

DAS J.

Mritunjoy Roy and another—Plaintiffs
v.

Netai Chand Dutt & others—Defendants.
Suit No. 1680 of 1938, Decided on 16th Feb. 1943.

Bengal Money-Lenders Act (10 of 1940), S. 35—Several mortgages—All mortgagors not liable on all mortgages — “Amount decreed” different as regards different mortgagors—Applicability of S. 35 in such case illustrated.

Section 35 requires the decree-holder to forego the difference between the specified price and the highest bid out of the “amount decreed.” The expression “amount decreed” in S. 35 means the principal and interest covered by the decree, i. e., the reported amount. Therefore the difference between the specified price and the highest bid has to be deducted from the reported amount which is the “amount decreed.” Section 35 of the Act proceeds on the basis that the amount decreed is one and the same in respect of all the mortgagors. In other words this section is easily applicable to a simple case where all the mortgagors are interested in and are liable on all the mortgages and the same amount for principal and interest is decreed against all of them. A question of nicety arises in the application of this section to a case where all the mortgagors are not liable on all the mortgages and consequently “the amount decreed” is different as against the different mortgagors. [The applicability of S. 35 in such a case illustrated.]

[P 258c,d]

S. R. Das Gupta — for Plaintiffs.

Shankar Banerji — for Defendants.

Order. — This is an application on the part of the plaintiffs decree-holders and purchasers at the Registrar's sale held on 12th September 1942 for leave to pay in the balance of the purchase money after setting off the amount of their claim and costs and for confirmation of the sale and issue of the sale certificate in their favour and other incidental reliefs. The facts material for the purpose of this application are not in dispute and are as follows: On 21st July 1936, the defendants Netai, Tarak and Barid executed a mortgage in favour of the plaintiffs to secure the repayment of the sum of Rs. 26,000 with interest thereon at 7½ per cent. per annum with quarterly rests.

On 18th August 1936 two of the defendants, viz., Netai and Barid executed a second mortgage on their shares in the mortgaged property in favour of the plaintiffs to secure the repayment of the sum of Rs. 2500 with interest thereon at 12 per cent. per annum with quarterly rests. On 11th August 1938 one of the defendants, viz., Netai executed a third mortgage on his share in the mortgage property in favour of defendant 4, Benode Behari Choudhury for the repayment of Rs. 1500 with interest thereon at 10 per cent. per annum. On 25th August 1938 the plaintiffs mortgagees instituted this suit on the two mortgages dated respectively 21st July 1936 and 18th August 1936 impleading Netai, Tarak and Barid as mortgagors defendants and Benode Behari Choudhury as the puisne mortgagee defendant. On 10th February 1939, the usual preliminary

a The trial Court gave effect to this contention and rejected the application. On appeal the judgment has been affirmed and it is against this appellate judgment that the present rule has been obtained.

Mr. Das who appears in support of the rule has raised a two-fold contention. He has argued first of all that in an application under S. 26F, Bengal Tenancy Act, the Court can only proceed on the basis that the lands sold constituted an occupancy holding and the entire scope of the enquiry under the section is restricted to matters which are specified in cls. 1 and 2. The Court is not competent to

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S. 26F proceeding did not operate as res judicata in the subsequent suit as the question relating to the nature of the tenancy could not be raised or decided in the proceeding under S. 26F, Ben. Ten. Act, the foundation of which was the admission of the purchaser in the purchase deed that the property sold was an occupancy holding. Dr. Basak appearing for the opposite party contended that since the above case was decided the provisions of S. 26F, Ben. Ten. Act have been amended by the amending Act of 1938 and cl. 10 of the present amended section gives a right of appeal from every decision made under that section. This, it is argued, shows that the proceeding f is no longer of a summary character and the enquiry is not restricted to the matters specified in cls. 1 and 2 of the section but embraces all questions of title which could be raised and decided in a suit. We do not think that the introduction of cl. 10 which gives a right of appeal is by itself sufficient to show that the intention of the Legislature was to extend the scope of enquiry under S. 26F, Ben. Ten. Act. We think however that it is not free from doubt as to whether the powers of the Court in dealing with an application under S. 26F, Ben. Ten. Act, are confined exclusively to matters specified in cls. 1 and 2. The judicial opinion is not quite uniform on this point. Mitter J. was against putting a rigid interpretation upon the section and he differed from the view taken by Henderson J. in several cases : *vide* 39 C. W. N. 1014.² It is not necessary for us to express any final opinion on this point for in our opinion the petitioner is entitled to succeed on the second point raised on her behalf.

It cannot be disputed that when a purchaser purchases a property which is specifically described as an occupancy holding and gives notice to the cosharer tenants under S. 26C, Ben. Ten. Act, and on the faith of the representation contained in the notice the cosharer tenants apply for pre-emption under S. 26F and deposit the money which is required to be deposited under that section, a plea of estoppel may be legitimately taken and unless it is shown that the applicant for pre-emption had previous knowledge as to the real character of the tenancy the purchaser would be precluded from alleging or proving that the tenancy was of a nature different from what it was represented to be. This view is supported by a decision of Mitter J. in 39 C. W. N. 1014² referred to above which follows an earlier decision of a Division Bench of this

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The result therefore is that the rule is made absolute. We set aside the order of the Courts below and direct that the matter should go back to the trial Judge in order that he might consider the question relating to sufficiency of the deposit made by the petitioner and dispose of the case in accordance with law. We make no order as to costs for this rule. Future costs will be in the discretion of the Court below. There will be no order for pre-emption with regard to that portion of the lands described in Sch. 2 which are comprised in the mokarari holding.

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Rule made absolute.

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A. I. R. (31) 1944 Calcutta 255

DAS J.

Mritunjoy Roy and another—Plaintiffs

v.

Netai Chand Dutt & others—Defendants.

Suit No. 1680 of 1938, Decided on 16th Feb. 1943.

Bengal Money-Lenders Act (10 of 1940), S. 35—Several mortgages—All mortgagors not liable on all mortgages — "Amount decreed" different as regards different mortgagors—Applicability of S. 35 in such case illustrated.

Section 35 requires the decree-holder to forego the difference between the specified price and the highest bid out of the "amount decreed." The expression "amount decreed" in S. 35 means the principal and interest covered by the decree, i. e., the reported amount. Therefore the difference between the specified price and the highest bid has to be deducted from the reported amount which is the "amount decreed." Section 35 of the Act proceeds on the basis that the amount decreed is one and the same in respect of all the mortgagors. In other words this section is easily applicable to a simple case where all the mortgagors are interested in and are liable on all the mortgages and the same amount for principal and interest is decreed against all of them. A question of nicety arises in the application of this section to a case where all the mortgagors are not liable on all the mortgages and consequently "the amount decreed" is different as against the different mortgagors. [The applicability of S. 35 in such a case illustrated.]

[P 258c,d]

S. R. Das Gupta — for Plaintiffs.

Shankar Banerji — for Defendants.

Order. — This is an application on the part of the plaintiffs decree-holders and purchasers at the Registrar's sale held on 12th September 1942 for leave to pay in the balance of the purchase money after setting off the amount of their claim and costs and for confirmation of the sale and issue of the sale certificate in their favour and other incidental reliefs. The facts material for the purpose of this application are not in dispute and are as follows: On 21st July 1936, the defendants Netai, Tarak and Barid executed a mortgage in favour of the plaintiffs to secure the repayment of the sum of Rs. 26,000 with interest thereon at 7½ per cent. per annum with quarterly rests.

On 18th August 1936 two of the defendants, viz., Netai and Barid executed a second mortgage on their shares in the mortgaged property in favour of the plaintiffs to secure the repayment of the sum of Rs. 2500 with interest thereon at 12 per cent. per annum with quarterly rests. On 11th August 1938 one of the defendants, viz., Netai executed a third mortgage on his share in the mortgage property in favour of defendant 4, Benode Behari Choudhury for the repayment of Rs. 1500 with interest thereon at 10 per cent. per annum. On 25th August 1938 the plaintiffs mortgagees instituted this suit on the two mortgages dated respectively 21st July 1936 and 18th August 1936 impleading Netai, Tarak and Barid as mortgagors defendants and Benode Behari Choudhury as the puisne mortgagee defendant. On 10th February 1939, the usual preliminary

a decree was passed in this suit and on 2nd July 1941 the usual final decree for sale was passed.

The Bengal Money-Lenders Act 1940 having come into operation in the meantime the mortgagors defendants applied for relief under that Act and the preliminary and final decrees passed in this suit were re-opened and a fresh preliminary decree was passed under the provisions of Bengal Money-Lenders Act on 14th July 1941 a copy of which is annexure "A" to the present petition. By cl. (1) of this new preliminary decree dated 14th July 1941 the Registrar was directed to take an account, amongst others, of what was due on that date to the plaintiffs for principal and interest on their two mortgages mentioned in the pleadings—such interest to be computed, subject to the rule of Damduput if the same be applicable, at the rate of 8 per cent. per annum simple. By cl. (3) it was referred to the Taxing Officer of this Court to tax the plaintiffs their costs of this suit payable under the aforesaid decrees and also including the costs of and incidental to the applications which resulted in the re-opening of the previous decrees and the passing of the new preliminary decree. Clause (4) of this decree declared that several parties were entitled to payment of the sums due to them in the following order, viz., (i) the plaintiffs and (ii) the defendant Benode Behari Choudhury. Clause (5) of this decree directed that the defendants or any one of them do pay into Court to the credit of this suit or to the plaintiffs such sums as may be found due in three equal annual instalments, the first of such instalments being payable within one month from the confirmation of the report of the Registrar and the taxed costs of the suit awarded to the plaintiffs and that the defendant Netai do pay into Court to the credit of this suit within the time specified therein such sum as may be found due and the taxed costs of the suit awarded to the defendant Benode Behari Choudhury and that on payment of the amounts due to the plaintiffs by the defendants or any one of them in the manner prescribed above and on payment thereafter of the costs of the suit and other costs charges or expenses as may be payable under R. 10 of O. 34, Civil P. C., the plaintiffs should bring into Court all documents in their possession or power relating to the mortgaged properties to be delivered to such person as the Court might direct and the plaintiffs should if so required reconvey or re-transfer the said property free from the said mortgages and from all encumbrances created by the plaintiffs or any person claiming under them. There was like direction on the defendant Netai and the

defendant Benode Behari Choudhury in respect of the third mortgage. It will be noticed that under this paragraph all the defendants were directed to pay the whole amount due to the plaintiffs under both the mortgages and no separate directions were given for the payment of separate amounts by the respective mortgagors under the respective mortgages in favour of the plaintiffs.

Then by cl. (6) of this decree it was further ordered that in default of payment of any one of the said instalments or the aforesaid taxed costs the plaintiffs may apply to the Court after giving a month's notice to the defendant, for a final decree for sale of the mortgaged property subject to the provisions of the Bengal Money-Lenders Act, 1940, and on such application being granted the mortgaged property or a sufficient part thereof be directed to be sold. This cl. (6) further provides that in the event of such sale being held the moneys realised by such sale shall be paid into Court and be duly applied, after deduction of commission and expenses of sale, in payment of the amount or the balance thereof payable to the plaintiffs under this decree in respect of the mortgage dated 21st July 1936 and under any further orders that may have been passed in this suit and in payment of the amount which may be adjudged due to the plaintiffs in respect of the costs of the suit and further costs charges and expenses and that the balance thereof, if any, be divided into three equal parts and that one of such equal parts shall be held subject to the further order of this Court and that two of such equal parts shall be duly applied in payment of the amount payable to the plaintiffs under this decree in respect of the mortgage dated 18th August 1936 and that the then balance, if any, shall be held subject to the further order of this Court. It will be noticed that under this part of cl. (6) the net sale proceeds were separately allocated to the two mortgages in favour of the plaintiffs and preserved 1/3rd of the balance left after satisfaction of the plaintiffs claims under mortgage 1 and the costs of this suit for the benefit of the defendant Tarak. Clauses 7 and 8 are not material for the purpose of this application. Clause 9 reserves liberty to the parties to apply to Court. On 5th September 1941, the Registrar made his report that on 14th July 1941 there was due to the plaintiffs a sum of Rs. 39,771-15-8 for principal and interest upto 14th July 1941 as set forth in the schedule annexed to the report. The schedule to the report shows that this sum of Rs. 39,771-15-8 is made up of Rs. 36,365-5-0 for principal and interest due under

a mortgage 1 dated 21st July 1936 and Rupees 3406-10-8 principal and interest due under mortgage 2 dated 18th August 1936.

The defendants having failed to pay the first instalment the plaintiff caused a notice to be served on all the defendants on 7th January 1942 which is set out in para. 8 of the petition. By this notice the plaintiffs intimated that they intended to apply on or after 6th February 1942 for execution of the decree for recovery of the said instalment with interest thereon at 6 per cent. per annum from the date of default, i. e., 5th January 1942. Paragraph 8 of the petition and the terms of the notice itself clearly indicate that the notice was given under sub-s. (2) of S. 34, Bengal Money-lenders Act, 1940. Notice under sub-s. (2) of S. 34 of that Act, however, is appropriate only in the case of money decrees in respect of unsecured loans advanced before or after the commencement of that Act. It was not a notice such as is required under sub-s. (1) (a) (ii) of S. 34 of the Act, and it is doubtful whether this notice complied with the necessary requirements of sub-s. (1) (a) (ii) so as to entitle the plaintiff to apply for the final decree. No point, however, has been taken by learned counsel for the defendants

b Netai, Tarak and Barid on the invalidity of this notice.

The final decree was passed on 3rd March 1942. Learned counsel for the defendants Netai, Tarak and Barid has not challenged the final decree on the ground of invalidity of the notice and consequently it is not necessary for me to consider whether the Court had jurisdiction to pass the final decree or whether, the final decree having been passed, I have any power to ignore the final decree in this suit as having been made without any jurisdiction. In view of the fact that no such point has been taken or argued before me

d I do not propose to go behind the final decree and I proceed on the footing that the final decree is a good decree binding on the parties.

Clause (1) of the final decree dated 3rd March 1942 directed that the mortgaged property be sold subject to a reserve price to be fixed by the Registrar. Clause (2) of the final decree directed that the monies realised by such sale shall, save as thereafter mentioned be paid into Court and shall be duly applied, after deduction of commission and expenses of sale, in payment of the amount payable to the plaintiffs under the aforesaid preliminary decree and under any further orders that may have been passed in this suit and in payment of the costs of the suit and subsequent costs as therein mentioned. Clause (3) of this final

decree provides that the plaintiffs be at liberty to bid for and purchase the mortgage property and it declared the purchaser to set off the amount of the purchase money pro tanto against the total amount payable or due to them as hereinbefore mentioned. The sale directed by the above decrees was to be under the provisions of Bengal Money-lenders Act, 1940, and consequently the Registrar fixed Rs. 44,000 as the specified price under S. 35 of that act which provides as follows:

"Notwithstanding anything contained in any other law for the time being in force, the proclamation of the intended sale of property in execution of a decree passed in respect of a loan shall specify only so much of the property of the judgment-debtor, as the Court considers to be saleable at a price sufficient to satisfy the decree, and the property so specified shall not be sold at a price which is less than the price specified in such proclamation.

Provided that, if the highest amount bid for the property so specified is less than the price so specified, the Court may sell such property for such amount, if the decree-holder consents in writing to forego so much of the amount decreed as is equal to the difference between the highest amount bid and the price so specified."

On 12th September 1942, the mortgaged property was put up for sale by the Registrar and the highest bid that was offered was offered by the plaintiffs for Rs. 40,000. The plaintiffs having consented to forego Rs. 4000 being the difference between the specified price and their bid the Registrar accepted such bid and declared the plaintiffs as the purchasers.

The plaintiffs have now applied for leave to pay into Court the sum of Rs. 81-8-7 or such other sum as to this Court may seem fit and proper as the balance of the purchase money after setting off their claim and costs and for confirmation of sale and issue of sale certificate. As to how they have arrived at the figure of Rs. 81-8-7 will appear from paras. 12, 13, 15 and 16 of the petition. Broadly speaking, they have taken the reported amount and added to it interest at 6 per cent. on the amounts of the first instalment and the amounts of the taxed costs with interest thereon making up the total figure of Rs. 43,043-15-2. To this they have added the subsequent non-taxed costs amounting to Rs. 874-8-3 and have arrived at the total claim of Rs. 43,918-7-5. Out of this total claim of Rs. 43,918-7-5 they have deducted Rs. 4000 being the difference between the specified price (Rs. 44,000) and their bid (Rs. 40,000) and shown the sum of Rs. 39,918-7-5 as the total sum they are entitled to set off against Rs. 40,000 leaving a balance of Rs. 81-8-7 which is the amount they propose to pay into Court.

Mr. S. R. Das Gupta who appears in support of this application has conceded that

a his clients are not entitled to interest on the first instalment and that therefore the sum of Rs. 497-2-3 should go out. He has handed up to me two sets of accounts showing how the figures should be calculated. Those accounts are referred to in this judgment as accounts A1 and A2. The account marked A1 is practically the same as the account set out in the petition except that the sum of Rs. 497-2-3 which Mr. Das Gupta conceded his clients were not entitled to charge has been omitted. In this account (A1) also he has arrived at the total claim by taking their reported amount and adding to it the costs taxed and untaxed and
 b interest on taxed costs and then deducting Rs. 4000 out of the total sum. This account (A1) as well as the account set out in the petition appears to me to be fallacious in principle. Deduction of Rs. 4000 out of the total claim arrived at by adding the amounts due under both the mortgages and the costs can be permissible only if all the mortgagors-defendants are liable on both the mortgages. This method of calculation ignores the fact that only two of the mortgagors are liable on both the mortgages and the third mortgagor is liable only on the first mortgage and deduction of Rs. 4000 out of the total claim so
 c computed works injustice to the third mortgagor who has nothing to do with the second mortgage. Further S. 35, Bengal Money-lenders Act, requires the decree-holder to forego the difference between the specified price and the highest bid out of the "amount decreed." A perusal of ss. 31 and 34, Bengal Money-lenders Act, will make it clear that the expression "decretal amount" or "amount of the decree" mean the principal and interest covered by the decree and in my opinion the expression "amount decreed" in S. 35 also means the principal and interest covered by the decree, i. e., the reported amount. There-
 d fore the difference of Rs. 4000 has to be deducted from the reported amount which is the "amount decreed."

Section 35 of the Act, proceeds on the basis that the amount decreed is one and the same in respect of all the mortgagors. In other words, this section is easily applicable to a simple case where all the mortgagors are interested in and are liable on all the mortgages and the same amount for principal and interest is decreed against all of them. A question of nicety arises in the application of this section to a case where all the mortgagors are not liable on all the mortgages and consequently "the amount decreed" is different as against the different mortgagors. In the case now before me cl. (1) of the new pre-

liminary decree, 14th July 1941, directed the Registrar to take an account of what is due on that date to the plaintiffs for principal and interest on their two mortgages. Clause 5 of this new preliminary decree directed the defendants or any one of them to pay such sums as may be found due in three equal annual instalments. Up to this clause no distinction was made in this decree between the mortgagors according to their respective liabilities. Clause 6, however, which gave the plaintiffs liberty to apply for final decree for sale provided that in the event of such sale being held the moneys realised by such sale should be applied, after deduction of com-
 mission and expenses of sale, in payment of the amount payable under the first mortgage and the costs therein specified and then the balance should be divided into three equal parts and that one of such equal parts should be held subject to further order of this Court and the remaining two equal parts should be applied in payment of the amount payable in respect of the second mortgage. These provisions preserve the share of Tarak in the balance left after the claim of the plaintiffs in respect of first mortgage and the costs are paid. Therefore it appears to me that the "amount decreed" against Tarak is the amount reported
 to be due in respect of the first mortgage, viz., Rs. 36,365-5-0 and the "amount decreed" against Netai and Barid is Rs. 39,771-15-5 being the total of the amounts due under both the mortgages.

The amount decreed being thus different the question arises as to how the difference of Rs. 4000 is to be deducted. Is the whole of Rs. 4000 to be deducted, so far as Tarak is concerned, out of Rs. 36,365-5-0 which is the amount decreed as against him and the whole of it is to be deducted, so far as Netai and Barid is concerned, out of Rs. 39,771-15-5 which is the amount decreed as against them or it is to be deducted proportionately from rupees 36,365-5-0 due under the first mortgage and Rs. 3406-10-5 due on the second mortgage according to the ratio between the said 2 sums? Mr. Das Gupta has strongly relied upon cl. 3 of the final decree which allowed the plaintiffs to set off the amount of the purchase money pro tanto against the total amount payable or due to them and he claims that the total amount payable to the plaintiffs is the aggregate of the two amounts due under the two mortgages less Rs. 4000 which his clients have agreed to forego. This argument, in my opinion, is untenable because the expression "the total amount due to them" in cl. (3) is qualified by the following words

a "as hereinbefore mentioned". Thus we are referred back to cl. 2 of this final decree which again refers to the payment of the amount payable to the plaintiffs under the aforesaid preliminary decree which, as I have said, under cl. 6 is different in amount as regards Tarak on the one hand and Netai and Barid on the other. Mr. Das Gupta has in his statement of account marked "A2" has purported to make up an account on the basis of proportionate reduction, but apart from other objection to be discussed later this statement of account also does not appear to me to be correct, because, he has not deducted proportionate shares of Netai and Barid in the difference of Rs. 4000 out of the claim against them in respect of the first mortgage and has thrown the whole of their proportionate shares on the amount due by them in respect of the second mortgage, thus throwing an additional burden on Tarak.

Mr. S. Bannerjee who appears for the mortgagors defendants has argued that the previous preliminary and final decrees having been re-opened the taxation of costs thereunder and the allocaturs issued in respect thereof must fall therewith and all the costs must be regarded as untaxed and the plaintiffs are not entitled to set off the amount of any of the allocaturs against the purchase price. He further contends that the plaintiffs are not entitled to any interest on the amounts of the allocatur as the new preliminary decree provides for no interest on costs. I am not of opinion that the re-opening of the old decrees has in the present case the effect of setting aside the old decrees in toto. In my opinion they were only re-opened in so far as it was necessary for arriving at the amount due by calculating interest in accordance with the provisions of the Bengal Money-lenders Act. Further cl. 3 of the new preliminary decree directed the Taxing Officer to tax the plaintiffs their costs of this suit payable under the aforesaid decrees. This provision, to my mind, suggests that the provisions of the old decrees in so far as they related to costs were not intended to be altogether abrogated and I am not prepared to hold that the allocaturs issued on taxation have become ineffectual or that the new preliminary decree abrogated the provisions for payment of interest on taxed costs. Mr. Bannerjee also argues, and I agree with him, that the plaintiffs are not entitled to set off the untaxed costs amounting to Rs. 874-8-3 at this stage.

Subject to his aforesaid contentions, the main argument of Mr. Bannerjee is that s. 35 was designed to ensure, in case where the

highest bid did not reach the specified price, that the mortgagors should be placed in the same position as they would be placed in if the specified price had been reached. He has handed up to me a statement of account in two parts which is referred to in this judgment as account "B". In the 1st part he has shown how the figures would have worked out if the specified price had been reached. He has taken the reported amount on the first mortgage and has added to it all costs taxed and untaxed without interest making a total of Rs. 39,810-4-3. Then he has deducted this sum of Rs. 39,810-4-3 from Rs. 44,000 and has shown that after satisfaction of the claim under the first mortgage and the costs of the suit there would have remained a balance of Rs. 4189-5-9. Then he shows that according to the preliminary decree this balance would be divided into three parts and Tarak's 1/3rd share of this balance amounting to Rs. 1396-7-3 should be set apart and held subject to the further order of the Court and remaining 2/3rd share of the balance amounting to rupees 2792-14-6 referable to the shares of Netai and Barid would be available to the plaintiffs in respect of the claim on the second mortgage on which Netai and Barid alone are liable. This is what would have happened if the property have been sold at the specified price and in such case the plaintiffs would have had to pay into Court at least Tarak's 1/3rd share in the balance amounting to Rs. 1396-7-3.

In the second part of this account marked "B" Mr. Bannerjee had credited Rs. 40,000. He has in effect deducted the whole of Rs. 4000 against the claim on the first mortgage and the costs, because while adding Rs. 3406-10-8 in the beginning he has deducted the same amount at a later stage and arrived at a balance of Rs. 35,810-4-3 which he has debited against the highest bid of Rs. 40,000 leaving a balance of Rs. 4189-11-9. This accounting shows that if the whole of Rs. 4000 is debited against the claim on the first mortgage and the costs then the result works out precisely in the same way as it would if the property had been sold at the specified price and it is only by this method of computation that Tarak can be put in the same position as he would have been in if the property has been sold at the specified price.

I agree with Mr. Banerjee that the method of calculation adopted by him is consonant with the language used in s. 35 of the Act and the object it was designed to secure and in order to put Tarak in the same position as he would have been in the whole of Rs. 4000 is to

- a be deducted out of the amount due under the first mortgage because that is "the amount decreed" so far as Tarak is concerned. This method of calculation does no injustice to Netai and Barid, because, so far as their liability is concerned, it does not matter a bit whether the whole of Rs. 4000 is deducted out of their liability under the first mortgage or out of their liability under the second mort-

gage or it is deducted proportionately out of their respective liabilities under the two mortgages. Mr. Banerjee's figures however are not correct in that he has not taken into account the Registrar's commission and the interest on the taxed costs and has included the untaxed costs. Applying, therefore, the correct principle as I conceive it to be the correct figures would be as follows:

Highest bid	...	...	...	...	...	Rs. 1075 0 0	Rs. 40,000 0 0
Registrar's commission	...	...	...	...	...	Rs. 36,365 5 0	
Reported amount under first mortgage and decreed against all the three mortgagors	...	...	...	...	...	Rs. 933 4 0	
Allocatur dated 13-5-40	...	...	...	...	...	Rs. 130 9 0	
Interest at 6 per cent. per annum from 13-5-40 to 12-9-42	...	...	...	...	...	Rs. 1637 6 3	
b Allocatur dated 9th December 1942	...	...	...	...	...	Rs. 73 10 0	
Interest at 9 per cent. per annum from 9-12-41 to 12-9-42	...	...	...	...	...	Rs. 40,215 2 3	
						Rs. 4000 0 0	
Less difference between specified price and the highest bid	...	...	...	...	...		Rs. 36,215 2 3
					Balance		Rs. 3784 13 9
One-third share of Tarak in the balance to be held subject to further order of Court...	...	...	...	...	...		Rs. 1294 6 7
							Rs. 2490 7 2
Due to plaintiffs from Netai and Barid under second mortgage	...	...	...	...	...		Rs. 3406 10 8
Still due to the plaintiffs under second mortgage from Netai and Barid besides untaxed costs of Rs. 874-8-3	...	...	...	...	...		Rs. 916 3 6

- c Thus the plaintiffs will have to pay into Court the sum of Rs. 1294-6-7 as Tarak's one-third share in the balance left after setting off the Registrar's commission, the amount decreed in respect of the first mortgage and the costs less Rs. 4000. As against this sum the plaintiffs will be entitled as against Tarak to the subsequent costs when taxed. As against Netai

and Barid the plaintiffs will have a claim for a personal decree for Rs. 916-3-6 plus the subsequent costs when taxed. The result is that I make an order in terms of the summons except that the plaintiffs be at liberty to pay into Court the sum of Rs. 1294-6-7 instead of Rs. 81-8-7. Certified for counsel.

R.K.

*Order accordingly.***A. I. R. (31) 1944 Calcutta 260**

ROXBURGH J.

Atul Chandra Bhaduri and others —
Appellants

v.

- a *Sheikh Akhtar Ali (on the death of Sheikh Maju) and others — Respondents.*

Appeal No. 1672 of 1939, Decided on 1st December 1943, from appellate decree of Sub-Judge, 2nd Court, Mymensingh, D/- 12th August 1939.

(a) Bengal Tenancy Act (8 of 1885), S. 88—Partition among superior landlords — Holding not split up nor rent apportioned—Surrender of portion of holding to some landlords is not valid.

Even where there has been a partition among the superior landlords if the actual land of their holding is a joint one not being split up and rent apportioned there cannot be any surrender of a portion of it to some only of the cosharer landlords. [P 261d,e]

(b) Bengal Tenancy Act (8 of 1885), S. 26E—Court not insisting on deposit—Sale confirmed—Sale is not void.

The sale in the rent execution proceedings is not void on the ground merely that confirmation of the

sale was made without the Court insisting on deposit of the landlord's fees as required by the section: 25 Bom. 337 (P. C.), *Rel. on*; 26 Cal. 603 and 7 C.W.N. 591, *Not foll.* [P 261f,g]

Jitindra Nath Sanyal and Jyotsna Sankar Bhaduri — for Appellants.

Kalikinkar Chakrabarti and Nirmal Kumar Sen (for Deputy Registrar) — for Respondents. 1a

Judgment. — This is an appeal by the plaintiffs who succeeded in the trial Court but whose claim was dismissed by the lower appellate Court. This suit was for declaration of the plaintiffs' jote right and title to the suit lands and for khas possession with mesne profits. Plaintiffs' case was that they had 2/3rd share in the suit lands, defendants 1 to 6 had 1/6th share and defendant 12 1/6th share and under them one Gayanath had an occupancy holding with a paddy rent of 6 mds., plaintiffs' share being 4 mds. There was a partition of the superior interest along with other properties of the plaintiffs, defendants 1 to 6 and 12, as a result of which lands consisting of the holding of Gayanath was divided into three

a portions, one each going to the defendants 1 to 6, defendant 12 and the plaintiffs respectively. The suit lands are those parts of the holding which were allotted to the defendants. The decree in the partition suit was made on 14th July 1930. The plaintiffs brought a rent suit (No. 1337 of 1931) against Gayanath making defendants 1 to 6 and defendant 12 parties to the suit and obtained a decree on 21st December 1931. The record does not show for what period rent was claimed in the suit. The plaintiffs obtained a decree and in execution brought the holding of Gayanath to sale on 23rd August 1935 and took possession on 23rd March 1936. Later, they brought a suit for possession under S. 9, Specific Relief Act, on 23rd April 1937. Failing to get possession they brought the present suit. The case of the contesting defendants 1 to 6 and defendant 12 is that after the partition the plaintiffs were no longer cosharers landlords, that Gayanath has surrendered his interest in the suit lands, that is to say, those portions of the holding allotted to the defendants and therefore the decree in rent suit was not a rent decree and the interest of the defendants in the suit lands did not pass in sale and execution thereof.

c The trial Court held that in fact there had been no surrender by Gayanath, that in any case there could not be a valid surrender at all of the suit lands as they were mere part of Gayanath's holding unless there had been consent of all the landlords including the plaintiffs. There is no evidence to show that the holding itself had been split up. The defendants had also taken the point that as the landlord's fee as required under S. 26(E), Ben. Ten. Act, had not been deposited by the plaintiffs before confirmation of sale and therefore, the sale was void. The trial Court did not accept the contention. The lower appellate Court has held that there was a surrender, that "the surrender was quite valid inasmuch as this was done after the separation of this land by partition." The Court had further held that the sale was in any case void for want of compliance with the requirements of S. 26 (E), Ben. Ten. Act.

d The learned advocate for the appellants contends that there is no evidence that the holding itself was split up or that the rent was apportioned or that the provisions of S. 88, Ben. Ten. Act, were complied with and therefore, although there has been a partition among the superior landlords the actual land of their holding is a joint one, their shares being represented by the actual lands as partitioned. The learned advocate for the res-

pondents has endeavoured to support by reference to the plaint that there was an admission by the plaintiffs that the holding itself had been split up and the rent had been apportioned. I am unable to accept this contention and on this point, I, therefore, agree with the view of the trial Court to the effect that the holding being still intact there could not be any surrender of a portion of it to some only of the cosharers landlords. Hence assuming that the finding of the lower appellate Court is correct, namely that Gayanath actually gave up possession of the lands in shares of the defendant, that could not have the effect of a valid surrender under the Act, such as to affect the plaintiffs' title obtained by virtue of his purchase in execution of his own decree for rent. If in fact there had been any splitting up of the holding itself, it is not easy to understand why in the rent suit the other defendants should have been made parties at all.

As regards the question whether the sale in the rent execution proceedings is void for want of compliance under S. 26 (E), Ben. Ten. Act, I agree with the view of the trial Court. In my opinion the sale cannot be held to be void on the ground merely that confirmation of the sale was made without the Court insisting on deposit of the landlord's fees as required by the section. The lower appellate Court has relied on 3 C. W. N. 531,¹ a case referring to S. 13, Bengal Tenancy Act, as it stood in 1897. The material wording of that section appears to be however, the same as that in S. 26 (E) of the Act as it stood before 1938 which are the terms applicable to the present case. 3 C. W. N. 531¹ was referred to in 7 C. W. N. 591,² and distinguished. With great respect, I must confess, I find it rather difficult to appreciate the distinction. In 3 C. W. N. 531¹ the defendant was a tenant who contended that her interest had been sold to one Baburam Mitter in an execution sale. The plaintiff contended that that sale was invalid for failure to deposit the landlord's fees as required by S. 13 of the Act. The Court held that the sale to Baburam was "invalid and ineffectual as transfer of the tenure to the tenant from the defendant." This apparently means that the Court treated the sale as a nullity. Otherwise, it is not possible to see how in a rent suit a previous court sale could be ignored. There were no proceedings to set the sale aside on the ground that it was

1. ('99) 26 Cal. 603 : 3 C. W. N. 531, Sk. Babar Ali v. Krishna Malini Dasi.

2. ('03) 7 C. W. N. 591, Mohim Chandra Bhutta-charjee v. Ram Lochan Dey.

a liable to be avoided. The sale was in fact treated as a nullity. In 7 C. W. N. 591² the sale had taken place in execution of a mortgage decree, and the judgment-debtor resisted the auction-purchaser in taking possession on the ground that the landlord's fee had not been deposited. It was held that it was not competent for the judgment-debtor to raise objection regarding delivery of possession. His objection was held to be manifestly frivolous because

b "he objects to the giving up of his tenure which has been properly sold because the auction-purchaser has not completed his title by payment of the landlord's fee and on this ground it has been held that the auction-purchasers cannot be put into possession. The sale however stands."

It was further held that even if the objections were valid, the landlord's fee might be deposited and a fresh certificate granted apparently meaning that fresh confirmation of sale might be made. If, however, the sale itself be held to be void as was done in 3 C. W. N. 531,¹ it is not easy to see how it could be given validity by a subsequent deposit of the landlord's fee nor why an objection on the ground that the sale was null and void was good when raised by a defendant in the earlier suit but bad when raised by the judgment-debtor in the latter case. The decision in the latter case relies on 27 I. A. 216,³ where a clear distinction is drawn between cases where a proceeding is to be treated as null and void, and cases where proceedings are to be treated merely as invalid and liable to be set aside in other suitable proceedings. With great respect, it appears to me that after 27 I. A. 216³ the basis of the decision in 3 C. W. N. 531¹ has disappeared.

a The provisions in S. 26 (E), Bengal Tenancy Act, and other similar sections of the Act, were clearly made as a means of collecting certain dues on behalf of the landlords. The method adopted is a simple one based rather on the analogy of a charge for admission to a public performance. The transfer can only be made in a certain way and part of the procedure for completing the transfer includes the requirement to pay a certain sum to the officer, Registrar, or the Court, as the case may be, before the final act completing the transfer is done. I can see nothing in the provisions which suggest that the intention was that if owing to the officer concerned overlooking his duties, he does his act without collecting the necessary entrance fee, the whole transfer itself is to be held entirely

void. Support for this view, I think, is to be found in the provisions in S. 26 (J) either as they now stand after amendment or as they stood previously. Section 26 (J) deals with the case where if we may continue the analogy, the officer as collector of the entrance money has been led astray, often by the deliberate act of the parties concerned. In other words, an occupancy holding has been transferred being described as a tenure thereby incurring a smaller landlord's fee. The officer concerned, acting under S. 26 (E), Bengal Tenancy Act, or the appropriate section has confirmed the sale under a misapprehension collecting an insufficient fee from the party f required to pay. In this case clearly his act is not to be held entirely void; on the contrary, S. 26 (J), Bengal Tenancy Act, explicitly says that the party concerned would be liable to pay the balance, and the landlord is given an opportunity and method of collecting it. It may be noted that in the respective provisions for collecting landlord's fees, there is no express provision that any one is liable to pay anything. The machinery of the Act is simply to provide that the party concerned cannot complete transaction without paying. The Act is silent on what happens if he succeeds in completing it without paying owing g to lack of vigilance on the part of the authority concerned. This may be an omission in the Act. It may be that S. 26 (J) requires an addition making a person who has achieved his object without paying, liable to pay, and giving the landlord a similar right to collect his dues as is given in the case where the parties have paid the deficit amount by a misdescription of the property transferred. The whole procedure of collection has affinity to the procedure for the collection of court-fees. In S. 6, Court-fees Act, Courts are enjoined to reject plaints unless plaintiffs pay certain sums. There is a similar provision h under O. 7, R. 11, Civil P. C., that the Court shall reject the plaint if an insufficient court-fee is given as required by the valuation given for the subject matter of the suit. In the Tenancy Act provisions, the Court or the Registration Officer, as the case may be, is collecting money for the landlord; under the Court-fees Act or the Code of Civil Procedure, he is collecting it for Government. In the latter case, I have never heard it suggested, that years after the disposal of the suit the whole proceeding might be treated as null and void on the ground that a sufficient fee had not been paid by the plaintiff when he entered upon his litigation. In my opinion, the objection based on the failure to comply

3. ('01) 25 Bom. 337 : 27 I. A. 216 : 7 Sár. 739 : 2 Bom. L. R. 927 (P.C.), Malkarjun v. Narhari.

a with the requirements of S. 26 (E), Bengal Tenancy Act, must fail.

The result is that this appeal is allowed and the decree of the lower appellate Court is set aside and that of the trial Court is restored. By consent, the amount of mesne profits is fixed at four maunds of paddy per year, at rupee one per maund from the date of dispossession up to the date of the suit. The decree of the trial Court is modified to this extent only. The plaintiffs will be at liberty to apply for further mesne profits from the date of the suit till the date of recovery of possession of the suit lands, if necessary. Leave to appeal under cl. 15, Letters Patent, is refused. The appellants will have their costs in the lower appellate Court and in this Court.

R.K.

Appeal allowed.

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R. C. MITTER AND BISWAS JJ.

Khetai Molla — Defendant — Appellant
v.

Nityananda Sarkar and others —
Plaintiffs — Respondents.

c Appeal No. 192 of 1940, Decided on 25th August 1942, from original decree of Sub-Judge, Birbhum, D/- 29th June 1940.

Bengal Agricultural Debtors Act (7 of 1936), S. 52 and S. 55 (2a) Rules under, R. 146 — Application to Board by mortgagee under S. 8 on 25th April 1939 — Board forwarding application to collector for sanction under R. 146 — Collector refusing sanction on 4th October 1939 — Application must be deemed to be pending within S. 52 from 25th April to 4th October 1939.

d The mortgagee filed an application under S. 8 against the mortgagor on 25th April 1939. The total debt of the mortgagor exceeded the sum of Rs. 5000 but was below the amount of Rs. 25,000. On the date when this application was made before the Debt Settlement Board, there was no limitation on the pecuniary jurisdiction of Debt Settlement Boards. On 15th May 1939, the Local Government however made rules under S. 55 (2a) and the Board forwarded the application of the mortgagee to the Collector for sanction in accordance with the provision of R. 146, on 25th September 1939. The Collector however refused his sanction on 4th October 1939 :

Held that the application, which the plaintiffs had filed before the Debt Settlement Board on 25th April 1939, must be taken to be pending within the meaning of S. 52 before the Debt Settlement Board till 4th October 1939, when the Collector refused the sanction prayed for and therefore the mortgagee in his suit to enforce the mortgage was entitled to add the period from 25th April 1939 to 4th October 1939 in computing the period of limitation. [P 264d,e]

Chandra Sekhar Sen and Kshitindra Nath Basu — for Appellant.

Apurbadhan Mukherjee — for Respondents.

R. C. Mitter J. — Defendant 1 borrowed a sum of Rs. 5999 from one Gopiballav Sarkar, the predecessor-in-interest of the plaintiffs on 20th April 1921. There was a stipulation to pay interest at the rate of 12 per cent. per annum to be compounded at the end of every year. As security for the loan, defendant 1 executed a mortgage in favour of the said Gopiballav Sarkar. Thereafter defendant 1 made three part payments on the three occasions and endorsed these payments on the back of the mortgage instrument. The last part payment which was endorsed on the back of the mortgage by him, was made on 21st May 1927. This suit has been filed on 16th f November 1939, which is beyond 12 years of the date of the last payment. The claim has been laid at Rs. 5999 only, the mortgagees having given up practically whole of their claim for interest. A question was raised in the lower Court to the effect that the suit was barred by limitation. That question was raised by the defendant on two grounds; the first ground was that in fact defendant 1 did not make any part payment on 21st May 1927, and endorse the same under his signature. That point was negatived by the learned Subordinate Judge, who came to the finding that defendant 1 had made part payment on the 9 said date and the endorsement, which is marked Ex. 6 (a), was in the handwriting of the said defendant and bore his signature. This part of the case has not been placed before us by the appellant, defendant 1.

For the purpose of saving the suit from limitation, the plaintiffs pleaded that they were entitled by reason of the provisions of ss. 33 and 52, Bengal Agricultural Debtors Act, to add the time between 25th April 1939, and 16th November 1939, when they actually presented their claim in the civil Court. This plea taken by the plaintiffs has been given effect to by the learned Subordinate Judge h and the correctness of this part of his judgment has been challenged by Mr. Sen, appearing for the appellant.

The facts bearing upon the last mentioned question are as follows: the plaintiffs filed an application under S. 8, Bengal Agricultural Debtors Act, against defendant 1 on 25th April 1939. The total debt of the said defendant exceeded the sum of Rs. 5000, but was below the amount of Rs. 25,000. On the date when this application was made before the Debt Settlement Board, there was no limitation on the pecuniary jurisdiction of Debt Settlement Boards. On 15th May 1939, the Local Government, however, made rules under S. 55 (2a), Bengal Agricultural Debtors

Act. By that Notification certain rules are framed of which Rr. 143 to 150 are relevant. Those rules came into force on 15th June 1939, and they were made applicable to all applications made before the Debt Settlement Board, except those in which the Debt Settlement Board had already determined the debt under S. 18 of the Act, by 15th June 1939. Rule 144 provides that the Debt Settlement Board would deal with all applications for settlement of debts if the total indebtedness of the debtors did not exceed Rs. 5000. If, however, the total indebtedness exceeded Rs. 5000, but did not exceed Rs. 25,000, the Debt Settlement Board could deal with such application provided the sanction in writing of the Collector had been obtained. Rule 146 provides :

"If the sum total of all debts mentioned by the debtor in his application under S. 8 or statement of debt under sub-s. (1) of S. 13 exceeds Rs. 5000 but does not exceed Rs. 25,000, the Board shall forward the application to the Collector for sanction under the proviso to R. 144 before passing any order upon it under sub-s. (2) of S. 13 or under S. 18."

In this case the Board forwarded the application, which the plaintiffs had presented before the Debt Settlement Board on 25th April 1939, to the Collector for sanction in accordance with the provision of R. 146, on 25th September 1939. The Collector, however, refused his sanction on 4th October 1939. On these facts the question is as to whether the application, which the plaintiffs had filed before the Debt Settlement Board on 25th April 1939, would be taken to be pending before the Debt Settlement Board till 4th October 1939, when the Collector refused the sanction prayed for. If it could be held to be pending, the plaintiffs would be entitled to add the period from 25th April 1939, to 4th October 1939, in computing the period of limitation. If the plaintiffs are entitled to that period, it is admitted that the suit would be in time, because in that case limitation would expire during the Pujah Vacation, and the plaint was presented on the reopening day after the vacation, that is to say, on 16th November 1939.

In our judgment the application before the Debt Settlement Board, which the plaintiffs had filed, must be taken to be pending within the meaning of S. 52, Bengal Agricultural Debtors Act. We have quoted the relevant rules in extenso. Rule 146 enacts that the Board is to send the application to the Collector for sanction. The rule is not that the Board is to return the application, if the total indebtedness exceeded Rs. 5000 but did not exceed Rs. 25,000, to the person presenting the application, in order that the latter may him-

self apply to the Collector. In the absence of such a rule requiring the return of the application to the person presenting it by the Board, we must hold that the proceedings before the Board would be regarded as pending within the meaning of S. 52 from the time when Rr. 144 to 150 came into force till the time the Collector refused sanction under R. 144. The only effect would be that the powers of the Board to settle the debts would remain suspended during that period. If the Collector had given the sanction, the proceedings which had already been instituted would have continued. If he had refused sanction, then and then only the proceedings before the Board would come to a termination. In this view of the matter we hold that the said suit has been filed in time, inasmuch as the plaintiffs are entitled to add the period from 25th April 1939 to 4th October 1939, in computing the period of limitation. The result is that this appeal fails. It is accordingly dismissed.

An application has been made before us under the Bengal Money-lenders Act praying for instalments. In view of the provision of S. 34 of the said Act, we have to grant instalments. After taking into consideration all the facts of the case including the fact that very little payments have been made by the debtor in the course of 21 years and that the creditors have been very considerate in the matter of interest, we think that the ends of justice would be met, if we grant five annual instalments. Our order is that each of the first four instalments would be for a sum of Rs. 1500 and the balance would be the last instalment. Each of these instalments will have to be paid within the month of Chaitra, each year, the first instalment being made payable within the month of Chaitra of the current Bengali year. In default of payment of any one of these instalments, the plaintiffs would be entitled to apply for a final decree in the terms of the Bengal Money-lenders Act. As the transaction was before the Bengal Money-lenders Act had come into force, the decretal amount will not bear interest. As the case is a case of first impression, we direct that the parties will bear their respective costs of this appeal in this Court.

Biswas J. — I agree.

G.N.

Order accordingly.

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RAU AND B. K. MUKHERJEA JJ.

Sm. Surabala Devi (Sm. Sarajubala Devi alias Digambari Devi) w/o Jiban Kumar Mukhopadhyay, trustee to estate of Kamini Kumar Mukhopadhyaya and another — Appellants

v.

Sudhir Kumar Mukhopadhyaya and others — Respondents.

Appeal No. 274 of 1941, Decided on 19th July 1943, from appellate decree of Addl. Dist. Judge, First Court, Dacca, D/- 27th May 1940.

(a) Hindu law—Adoption—Bengal — Twice-born classes — Upanayana performed in family of birth—Adoption of such boy is not valid.

In Bengal an adoption of a son belonging to the twice-born classes made after the upanayana ceremony has already been performed in the family of birth is not valid: *Texts and Case law discussed.*

[P 267g]

Hindu Law —

('40) Mulla, Page 540.

('38) Mayne, Page 249.

(b) Hindu law—Texts — In Bengal Dattaka Chandrika prevails over Dattaka Mimamsa.

The Dattaka Chandrika and the Dattaka Mimamsa are equally respected all over India, but where these are in conflict, the doctrine of the former prevails in Bengal: 12 M.I.A. 397 (P.C.), *Foll.*

[P 265h; P 269f,g]

(c) Hindu Law —

('40) Mulla, Page 13.

('38) Mayne, Page 56.

(c) Hindu law—Reversioner—Right of suit—Suit by presumptive reversioner is representative one—Suit to declare adoption by widow as invalid is permissible (Per B. K. Mukherjea J.).

It is permissible for a presumptive reversioner under Hindu law to file a suit during the lifetime of the female owner for a declaration that an adoption made by her is invalid. The suit by the presumptive reversioner in such cases is really a representative suit brought on behalf of the whole body of possible successors and the right to sue is based on the danger to the inheritance common to all the reversioners which arises from the nature of their rights. The adoption of a son by a Hindu widow endangers the title of the next in succession and a suit can be instituted by the reversioners to remove what would be a bar to their rights when they vested in possession.

[P 268a,b,c]

Hindu Law —

('40) Mulla, Page 217.

('38) Mayne, Page 814.

A. C. Gupta, Jitendra Kumar Sen Gupta and Rabiranjan Das Gupta — for Appellants.

Urukramdas Chakravarty — for Respondents.

Rau J. — This appeal is by defendant 1, Surabala, and defendant 2, her adopted son, Jayanta alias Suhrid, in a suit brought by the plaintiff-respondent to have the adoption of defendant 2 by defendant 1 set aside as invalid and for certain other reliefs. Both the Courts below have set aside the adoption while refusing the other reliefs.

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Two points are raised by the appellants before us. First, it is said that the plaintiff's interest in the property held by defendant 1, Surabala, is too shadowy to enable him to obtain a declaration of the invalidity of the adoption under S. 42, Specific Relief Act. The argument is that the position of the latter in respect of that property is not that of a Hindu widow with limited powers but that of a trustee with full powers of disposal, so that if she exercises them the plaintiff as reversioner can get nothing. Now, it is true that so far as the property was derived from her father-in-law, her position is that of a trustee, what her powers under the trust deed may be we need not discuss. But according to the trial Court a portion of the property, however small, came to her by inheritance from her husband; if so, the plaintiff's reversionary interest at least in respect of this portion cannot be ignored. To get over this difficulty, the appellants point to the lower appellate Court's finding that there is nothing on record to show what property, if any, was left to her by her husband. It is to be noted however that the point now raised before us was not taken at the trial. Had it been taken the plaintiff might have produced enough evidence to satisfy even the lower appellate Court. In these circumstances this point must be decided against the appellants.

I now come to the main question involved in this appeal, the question, namely, whether according to the law amongst Hindus in Bengal a young man of one of the regenerate castes can be validly adopted after his upanayan ceremony (investiture with the sacred thread) has been performed in the family of his birth. In the present case the young man concerned is a Brahmin; his age at the date of adoption was 26, and his thread ceremony had, of course, already been performed.

On questions relating to adoption, the Dattaka Chandrika and the Dattaka Mimamsa are equally respected all over India, and where these are in conflict, the doctrine of the former is said to prevail in Bengal: 12 M.I.A. 397¹ at p. 437. On the particular point now before us, these two authorities are not in conflict.

First as to the Dattaka Chandrika; the relevant rules are in paras. 20-33 of S. 2 of Sutherland's translation.

Paragraph 20 lays down that the samskaras or sacraments which have not been performed by the natural father must be performed by

1. ('67-69) 12 M.I.A. 397 : 1 Beng.L.R. 1 : 10 W.R. 17 : 2 Sar. 361 : 2 Suther. 135 (P. C.), Collector of Madura v. Mootoo Ramalinga.

- a the adopter, but not those already performed. Paragraphs 21 and 22 explain the reason and the object of this rule. Then follows para. 23: "And accordingly, if the rite of investiture merely be performed, the filiation of the son given, as son of the adopter, is completed in conformity with the text of Vasistha subjoined. . . ."

The meaning is evidently that the sacraments previous to investiture (upanayana) such as tonsure, need not be performed by the adopter; it is sufficient if he performs that upanayana ceremony. This is enough to complete the filiation. Paragraph 24 deals with the dwyamushyayana son and is not relevant to the present discussion. Paragraph 25 cites

- b certain verses reputed to be from the Puranas (the reference is doubtless to the Kalika Purana) and winds up with the remark that they are unauthentic. In paras. 26-28 the author goes on to say that even if the verses are regarded as authentic, the interpretation usually put upon them is incorrect and he proceeds to indicate two alternative interpretations. As one of these throws some light on the author's views on the question now before us, it deserves examination. For this purpose it is convenient to have the actual verses in front of us :

(१) पितुगोत्रेण यः पुत्रः संस्कृतः पृथिवीपते ।
आचूडान्तं न पुत्रः स पुत्रतां याति चान्यतः ॥

(२) चूडाया यदि संस्कारा निजगोत्रेण वै कृताः ।
दत्ताद्यास्तनयास्ते स्युरन्यथा दास उच्यते ॥

(३) यदि स्यात् कृतसंस्कारो यदि वार्तातशैशवः ।
ग्रहणे पञ्चमाद्वर्षात् पुत्रेष्टिं प्रथमं चरेत् ॥

(The text is that given in Mr. J. C. Ghose's "Principles of Hindu Law," 1919.) I may observe incidentally that the third verse quoted above is slightly different from that which appears in the Dattaka Mimamsa. The Dattaka Mimamsa version as given in Mr.

- d Ghose's collection runs :

उध्वन्तु पञ्चमाद्वर्षात् न दत्ताद्याः सुता नृप ।
गृहीत्वा पञ्चवर्षीयं पुत्रेष्टिं प्रथमं चरेत् ॥

Leaving the third verse out of account for the present, I would observe that the ordinary interpretation of the first two verses (which is also the interpretation put upon them by the author of the Dattaka Mimamsa) is in substance this. Verse (1) : A son who is initiated in the family of his natural father "unto the ceremony of tonsure inclusive" (आचूडान्तं) that son cannot become the son of another by adoption. Verse (2) : If the sacraments "beginning with the ceremony of tonsure" (चूडायाः) are performed in the

adopter's own family, the adoptee counts as his son; otherwise he is termed a slave. (I have given a free rendering of the verses so as to make the meaning clear.) Thus rendered, the verses make the ceremony of tonsure the decisive factor and not the upanayana ceremony: if tonsure and the antecedent ceremonies have been performed in the family of birth, the boy cannot be adopted but if—and only if—tonsure and the subsequent ceremonies are performed in the family of adoption, the boy counts as an adopted son.

The author of the Dattaka Chandrika considers this rendering inaccurate and offers two alternatives. The second of the two is of immediate interest to us. As regards the first verse, the author construes the words "न पुत्रः" with the words that precede instead of with the words that follow and the remarkable result is reached that the verse means exactly the opposite of what it is usually supposed to mean. Instead of meaning that a son whose sacraments down to tonsure have been performed in the family of birth cannot become a son elsewhere by adoption, it really means, according to the author, that a son is no son in the family of his birth even if his sacraments down to tonsure have been performed, because he can become a son elsewhere by adoption. Then, as to the second verse, the author construes the compound word चूडायाः as meaning not sacraments beginning with tonsure but as sacraments beginning after tonsure. Whether these liberties can be taken with the language of the verses is a matter with which we are not concerned at present: what concerns us now is whether the resulting interpretation sheds any light on the author's own views. I think it does. The first verse, as construed in the above manner, brings out very clearly the author's view that the performance of the tonsure (and the sacraments antecedent to tonsure) in the family of birth is not at all an impediment to subsequent adoption. The second verse, if we construe चूडायाः as the author suggests, would mean that if the sacraments beginning after tonsure — that is to say, beginning with upanayana in the case of the regenerate castes — are performed in the adopter's own family, the adoptee becomes a son in that family, otherwise he is termed a slave (अन्यथा दास उच्यते). These last words are important; the author has not sought to explain them away, as he has sought to explain away other words, he therefore seems to accept the position that unless the sacraments beginning after tonsure are performed in the family of the adopter, the adoption is infructuous. We thus get a step

a further than in para. 23: the performance of the upanayana ceremony (in the case of the regenerate castes) by the adopter is not only sufficient but is also necessary to complete filiation. Reading this with para. 20 (wherein it is said that sacraments "already performed by the natural father are not to be cancelled") we arrive at the conclusion that if the upanayana ceremony has already been performed before adoption, the adoption cannot be effective.

Paragraph 30 explains away the five-year age-limit mentioned in the third verse from the Kalika Purana, while para. 33 appears to do away with all age-limits as such, for it says "And thus the practice of all the ancients even, in respect to the adoption of a son, unlimited to any time is upheld." The net result of the rules appears to be : (1) There is no age-limit as such for adoption. (2) But it is essential that all post-tonsure ceremonies (beginning with upanayana in the case of the regenerate castes and marriage in the case of Sudras) must be capable of being performed and must be performed in the family of the adopter. As a corollary to (2) it follows that where the upanayana ceremony has already been performed in the family of birth, no valid adoption can be made.

The views of the author of the Dattaka Mimamsa are easier to disentangle and are of a much more pronounced character. He relies on the verses from the Kalika Purana already cited and deduces therefrom three rules which, following Mayne (9th Edn. para. 140) we may put thus : first, that the limit of age as not exceeding five is absolute; secondly, that one who has had the tonsure performed ought not to be adopted, as he will at the outset be the son of two fathers; but thirdly, if no other is procurable, a boy on whom tonsure has been performed may be received, provided, however, that the previous rites be annulled by the performance of the putreshti or sacrifice for male issue. These rules leave no room for the adoption of a boy whose upanayana ceremony has already been performed.

Turning to other authorities, we find that Jagannatha accepts the puranic verses as literally binding and does not recognise the adoption of a boy who has either completed the fifth year or upon whom the tonsure ceremony has already been performed. A fortiori, the adoption of a boy whose upanayana ceremony has already been performed would be invalid in his views. Smriti authority on this particular question appears to be confined to a text of Vasistha's quoted by the authors

of the Dattaka Chandrika and the Dattaka Mimamsa :

अन्यशाखोद्भवोदत्तः पुत्रश्चैवोपनायितः ।

स्वगोत्रेण स्वशाखोक्तविधिना स स्वशाखभाक् ॥

"Sprung from one following a different Sakha (or branch of the Vedas) the Dattaka son even when invested with the sacred thread under the family name of the adopter himself, according to the form prescribed by his peculiar Sakha becomes a participant of the Sakha of the adopter."

It can hardly be claimed that this text lays down a rule that the upanayana ceremony must always be performed in the adopter's family: e. g., where the adopter and the adoptee belong to the same Sakha. Smriti authority must therefore be held to be inconclusive on this particular point.

Turning to the case law on the subject, we find an early Bengal decision: 6 S. D. A. 219.² This was in 1838. The Pundit of the Court was asked :

"Is adoption restricted to any particular age by the Shastras? And if so, is the law respecting the particular age applicable to all or only to some of the Hindoo tribes?"

The answer, purporting to be based on the Dattaka Mimamsa, was that the period fixed for adoption with respect to the three superior tribes Brahmins, Kshatriyas and Vaisyas was prior to their investiture with the respective cords, and with respect to Sudras, to their contracting marriage. The case was decided accordingly. The decision appears to have been affirmed in subsequent cases and so far as I am aware has never been departed from.

Whatever may be the position in other parts of India, it seems to result from the sources deemed authoritative in Bengal that an adoption made after the upanayana ceremony has already been performed in the family of birth is not valid. The view taken by the Courts below is therefore correct and the appeal must be dismissed. The parties will bear their own costs throughout. The cross-objections are not pressed and are also dismissed.

B. K. Mukherjea J. — I agree with my learned brother in holding that this appeal should be dismissed. Two points which have been raised by Mr. Gupta on behalf of the appellants and which require determination in this appeal are as follows: (1) Whether in view of the findings arrived at by the Courts below the plaintiff is entitled to any declaration, under s. 42, Specific Relief Act, that the adoption of defendant 2 as a son by defendant 1 is invalid in Hindu law. (2) Whether according

2. (1838) 6 S. D. A. 219, Bullubkant Chowdree v. Kishenprea Dassea Chowdrain.

a to Hindu law as it is applied in Bengal the adoption is really invalid by reason of the fact that the parties belonged to a twice-born class and the adoptee who was 27 years of age at the time of adoption had his ceremony of upanayan or investiture with sacred thread already performed in the family of his birth.

As regards the first point, it cannot be disputed that it is permissible for a presumptive reversioner under Hindu law to file a suit during the lifetime of the female owner for a declaration that an adoption made by her is invalid. This right has been expressly recognized in *Illust. (f) to S. 42, Specific Relief Act*. It is true that the reversionary heir has only a contingent interest in the property which is nothing more than a mere possibility or *spes successionis*, but as has been held by their Lordships of the Judicial Committee in *42 I. A. 125*,³ the suit by the presumptive reversioner in such cases is really a representative suit brought on behalf of the whole body of possible successors and the right to sue is based on the danger to the inheritance common to all the reversioners which arises from the nature of their rights. The adoption of a son by a Hindu widow endangers the title of the next in succession and a suit can be instituted by the reversioners to remove what would be a bar to their rights when they are vested in possession: *vide* *Mayne's Hindu Law*, S. 678, p. 816. Mr. Gupta does not assail the propriety of this view in any way; what he says is, that according to the findings arrived at by the Courts below, defendant 1 is in possession of the properties specified in the schedule to the plaint not in the capacity of an heir to the last male owner but as a trustee and beneficiary under the trust deeds executed by Kamini Kumar Mukherjee to whom the properties belonged. She has

c neither the limited interest of a Hindu female heir in the property nor is the plaintiff a presumptive reversioner in relation to her. The principle of law which entitles a reversioner to maintain an action for declaration against a widow when her acts are injurious to the reversion has no application, therefore, to the facts of the present case. Both the Courts below have held that the trust deeds executed by Kamini Kumar, the validity of which was impeached by the plaintiff are legal and operative documents. This finding has not been seriously challenged by the learned advocate appearing for the plaintiff respondent.

So far as the properties comprised in the trust deed are concerned, it must be held therefore that defendant 1 is holding them not as an heir to her husband who did not inherit these properties at all from Kamini but in her own rights as a trustee and beneficiary under the trust deeds of Kamini. With regard to these properties the plaintiff cannot be said to occupy the position of a reversionary heir under the Hindu law which would entitle him to have a declaration during the life time of the widow. In answer to this, the learned advocate appearing for the respondent points out, that quite apart from the properties comprised in the trust deeds of Kamini, there were other properties belonging to Jiban personally which were inherited by defendant 1 after his death. In respect to these properties which are also the subject-matter of the suit, the position of the plaintiff is certainly that of a reversioner under the Hindu law and as such he can pray for a declaration that the adoption made by the widow is invalid.

Now it appears from the judgment of the trial Court that Jiban, the husband of defendant 1, did acquire some properties as a legatee under the will of his grand-mother Anandamoyee Debi. Jamini, the father of the plaintiff was the executor under that will and he took out probate which has been made an exhibit in this case. In prayer (Ga) of the plaint the plaintiff prayed for a permanent injunction restraining defendants 1 to 3 from committing waste in respect of any of the properties which Jiban got either by inheritance from his father or under the will of his paternal grand-mother. One of the issues in the suit, viz., Issue 7 was worded as follows:

"Is defendant 1 in possession of the estate left by Kamini Kumar Mukherjee as a trustee? If so, is the suit maintainable?"

The learned trial Judge in deciding this issue observed at the outset that the plaintiff brought the suit on the assumption that Surabala was in possession of the estate in her widow's right and ignored her possession as a trustee altogether. Surabala according to the Subordinate Judge held the estate of Kamini Babu as a trustee under the trust instruments though she had a Hindu wife's interest in some small properties belonging to Jiban personally. As the bulk of the properties were included in the trust deed, the Subordinate Judge was of opinion that the proper way of restraining the trustee from committing acts of indiscretion or waste would be by taking action under the provisions of the Trusts Act and the present suit was not

3. (15) 2 A. I. R. 1915 P. C. 124 : 29 I. C. 298 : 38 Mad. 406 : 42 I.A. 125 (P.C.), Venkatanarayana Pillai v. Subbammal.

a maintainable. The Subordinate Judge further observed :

"The plaintiff as a next reversioner can of course question the validity of adoption by Surabala and sue for injunction in respect of the properties left by Jiban in which Surabala as widow has only life interest."

In the ordering portion of the judgment, as well as in the decree the only relief given to the plaintiff was that the adoption of defendant 2 as a son by defendant 1 was set aside; and the prayer for injunction was not allowed even in respect of properties which were held by Surabala as heir to her husband. This decree was affirmed on appeal by the Additional District Judge of Dacca. In the concluding portion of the judgment the lower appellate Court observed as follows:

"There is nothing on record to show in particular what property, if any, Jiban left in his individual capacity, that is, not as trustee or a beneficiary under the trust deed. So no question regarding Jiban's personal properties arises in this case and moreover, there is nothing to show what personal properties, if any, of Jiban or his brother Sisir have come to the possession of their widows."

This finding of the Additional District Judge has been assailed by the learned advocate appearing for the respondent. It is true that the lower appellate Court did not advert to Ex. G which was produced on behalf of the defendants and which would go to show that Anandamoyee did execute a will giving certain properties to Jiban. It may be that as the plaintiff's substantial case was that the trust deeds executed by Kamini were illegal and all the properties were possessed by defendant 1 in the limited interest of a Hindu widow he did not make a serious attempt to make a separate case with regard to the small personal properties left by Jiban. On the other hand, it appears that the defendants did not raise this point specifically in any of the Courts below that the plaintiff was not entitled to a declaration under S. 42, Specific Relief Act, and there was no issue framed on this point. It seems to me that if this question had been pointedly raised, the Courts below could have adverted more fully into the matter and discussed the evidence on the record in order to arrive at a clear finding upon it. As admittedly there were some properties left by Jiban which are also the subject-matter of the suit I am unable to say that the plaintiff's suit for declaratory relief under S. 42, Specific Relief Act, should be thrown out.

The other point taken in this appeal raises an interesting question of Hindu law relating to limitations upon the right of adoption

arising from age of the adoptee or the previous performance of initiatory ceremonies in his natural family. In the present case, it is not disputed that at the time when defendant 2 was taken in adoption by defendant 1 he was nearly 27 years of age and was already invested with sacred thread in the family of his birth. The question is whether such adoption is valid according to Hindu law as is recognized in this province.

Mr. Gupta is right in saying that neither the Smritis nor the original commentators lay down any rule relating to age of a person which restricts his capacity of being adopted. Certain restrictions have undoubtedly been introduced later on and they are to be found in comparatively later treatises on the subject like Dattaka Mimamsa and Dattaka Chandrika. Both these are special works on the law of adoption and partly because they were very early accessible to English Judges from being translated into English by Sutherland but mainly because they were spoken of in very high terms by the Judicial Committee in more cases than one, they have come to possess an authority and importance which perhaps they would not otherwise have deserved. The Privy Council in 12 M. I. A. 397¹ at p. 437 accepted the opinion expressed by Macnaghten that both these treatises are respected all over India and in cases of difference between them the doctrine of Dattaka Chandrika is adhered to in Bengal and the southern provinces while Dattaka Mimamsa is held to be an infallible guide in the Province of Benares and Mithila. There is no doubt an acute controversy both among lawyers and Pandits regarding the authority of these works and there is a persistent tradition in Bengal that the Dattaka Chandrika is a literary forgery and in fact it was the work of one Raghurani Vidyabhusan who was the spiritual preceptor of the Nadia Raj family. The Judicial Committee, however, in 26 I. A. 113⁴ clearly laid down that

"the authority of these works was not open to examination, explanation, criticism, adoption or rejection like any scientific treatise on European Jurisprudence. Such treatment would not allow for the effect which long acceptance of written opinions has upon social customs and it would probably disturb recognized law and settled arrangements."

Let us see how the subject has been dealt with in these two Dattaka works. Nanda Pandit while discussing the qualifications of the person to be adopted refers to a special rule which he says is propounded in the

4. ('99) 22 Mad. 398 : 26 I. A. 113 : 21 All. 466 : 9 M. L. T. 67 : 7 Sar. 330 (P. C.), Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshamma.

a Kalika Puran. The verses in the Kalika Puran referred to by him read as follows: (Dattaka Mimamsa S. IV, 22)

दत्ताया अपि तनया निज गोत्रेण संस्कृतः ।
आयान्ति पुत्रतां सम्यगन्यबीजसमुद्भवाः ॥
पितुर्गोत्रेण यः पुत्रः संस्कृतः पृथिवीपते ।
आचूडान्तं न पुत्रः स पुत्रतां याति चान्यतः ॥
चूडाया यदि संस्कारा निजगोत्रेण वै कृताः ।
दत्तायास्तनयास्ते स्युरन्यथा दास उच्यते ॥
ऊर्ध्वन्तु पञ्चमाद्वर्षात् न दत्तायाःसुता नृप ।
गृहीत्वा पञ्चवर्षीयं पुत्रेष्टिं प्रथमं चरेत् ॥

b The following is the English rendering of these verses as given in Sutherland's translation of Dattaka Mimamsa:

(1) "Sons given, and the rest though sprung from the seed of another, yet being duly initiated under his own family name become sons. (2) O Lord of the earth, a son, having been initiated under the family name of his father, unto the ceremony of tonsure inclusive (आचूडान्तं) does not become the son of another man (Anyatas). (3) The ceremony of tonsure and other rites (Chudadya) of initiation, being indeed performed, under his own family name, sons given and the rest may be considered as issue: else, they are termed slaves. (4) After their fifth year, O King, sons given, and the rest are not sons. But having taken a boy, five years old, the adopter should first perform the sacrifice for male issue."

c These passages have been elaborately commented upon by Nanda Pandit and the conclusions arrived at by him may be summed up as follows: (1) The relationship of father and son is created by due performance of initiatory ceremonies, and the adopted son becomes the son of the adopter by reason of the performance of these ceremonies in the family of the latter (S. IV, 23). (2) Consequently, a boy for whom none of the initiatory ceremonies have been performed by the natural father is most eligible for adoption. Next to him is he whose ceremonies after birth and not including Chura have been performed (S. IV, 38). (3) That son who is initiated under the family name of his natural father, unto the ceremony of tonsure, that is, in rites ending with tonsure (आचूडान्तं) does not become the son of another by adoption (IV, 30).

a Such a son according to Nanda Pandit may be taken in adoption if his age does not exceed five years. In such cases, it is necessary to perform Putreshti ceremony, but even then he ranks only as Dwyamushyana or son of two fathers (IV, 32). (4) A boy whose age exceeds five years cannot be taken in adoption at all.

The author of Dattaka Chandrika in discussing the law on the point proceeds upon different lines altogether. First of all, he com-

bats the view that filial relation is created by performance of initiatory ceremonies. It is the father alone who by virtue of his relationship as father to the son is competent to perform the initiatory ceremonies. The adoptive father therefore can perform those ceremonies which are necessary to be performed subsequent to adoption and which have not been performed in the family of birth. The repetition of ceremonies already performed by the natural father is not required (S. II, 20 and 21).

In the next place, Dattaka Chandrika does not accept the authenticity of the passages in Kalika Puran upon which reliance is placed by Nanda Pandit. Accepting these texts to be genuine, the author of Dattaka Chandrika expresses the opinion that they do not bar the adoption of a child whose tonsure has already been performed in the family of birth and who may be more than five years old (S. II, 26.) The second verse of Kalika Puran according to him does not mean that a boy upon whom ceremonies up to and including tonsure have been performed by the natural father cannot become the son of another; what it means is that "a son" (that is, adopted son) though initiated as far as tonsure by his natural father is not a son (to such father), the reason being that he bears filial relation to another (II, 28). The word "Chudadya" (चूडाया) in the third couplet is interpreted by Dattaka Chandrika to mean not ceremonies up to and including tonsure, but ceremonies which are preceded by tonsure and which means upanayan in the case of the three regenerate castes and marriage in the case of Sudras (II, 29). This makes it conformable to the following text of Vasishtha which is quoted in Dattaka Chandrika, viz.:

"Sprung from one following and different sakha (or branch of the Vedas) the given son even, when invested with characteristic thread, under the family name of the man himself, according to the form prescribed by his peculiar sakha, becomes participant of the duties of such sakha."

h Lastly, it is said that the mention of five years in the text of Kalika Puran has reference to a Brahmin who is intended for the study of theology and for whom investiture with sacred thread at the age of five years is prescribed. The conclusion of Dattaka Chandrika seems to be that there is no limit of any particular time regarding adoption and the only restriction is that the ceremony of upanayan in the case of the three higher castes and marriage in the case of Sudras must be capable of being performed in the family of adoption.

In one passage Dattaka Chandrika seems

to have suggested that the adoption must take place before the primary age prescribed for upanayan expires, which is eight years from conception in the case of Brahmins and 11 and 12 years in the case of Kshatrias and Vaisyas respectively. The view expressed is that although the Upanayan ceremony can be performed in the secondary season yet as the relationship of father and son was wanting between the adopter and the adoptee at the primary season the adoptive father cannot perform these ceremonies at the secondary season. Sutherland, however, in commenting upon Dattaka Chandrika has pointed out that the non-performance of upanayan ceremony at the proper season is not an insuperable bar to adoption and it can be performed in the family of adoption if the Putresthi ceremony is gone through as a form of expiation.

Mr. Gupta argues that the performance of upanayan ceremony in the family of birth cannot be a bar to an adoption for the passage of Vasishtha upon which Dattaka Chandrika relies goes to show that investiture with sacred thread in a particular family means affiliation to the particular sakha or branch of the Vedas which is followed by that family. Difficulties may arise when a different sakha is followed by the family of adoption. But if both the families have the same sakha, upanayan in the family of birth cannot create any impediment whatsoever. It is true that in ancient times upanayan really marked an entry into the period of study and each family purported to follow a particular sakha or branch of the Vedas. These things, however, become totally obsolete later on, though the names of the sakhas are still preserved as matter of tradition. But quite apart from that, the text of Vasistha simply lays down the consequence of adoption, and the effect according to him is that even though the family of the adopter followed a different sakha the adopted son after adoption becomes completely merged in the family of the adopter and becomes affiliated to the sakha of the latter. To have that effect, it is necessary that the adoptee should be invested with sacred thread in the family of the adopter. The text is relied upon by Dattaka Chandrika as an authority for the view taken by him that the expression "Chudadya" (चूडाया) as used in the Kalika Puran means upanayan and not any ceremony previous to that. The conclusion therefore is that according to Dattaka Chandrika it is absolutely necessary that in the case of the three twice-born classes the adoption must take place before the boy is invested with sacred thread and necessarily an adoption after upa-

nayan is performed in the family of birth is inoperative.

There is no standard work on the subject of adoption expressly for Bengal yet as Macnaghten points out that in cases of difference between Dattaka Mimamsa and Dattaka Chandrika, the doctrines of the latter conform to those of Bengal: *vide* Macnaghten's Hindu Law, p. 74. Among other Bengal authorities Jagannath in his Digest also refers to the passages in Kalika Puran and he interprets them even more rigidly than Nanda Pandit. According to him, there may not be a valid adoption of a boy who has either completed fifth year or upon whom the ceremony of tonsure has already been performed: *vide* Colebrooke's Digest, Book V, 293.

The Bengal Pandits do not seem to have ever given effect to the strict view of Nanda Pandit even when they quote him as authority. In 1 Beng. Sel. Rep. 213,⁵ there was a claim by the daughter of a deceased Hindu to recover his estate from a son adopted by his widow. The ground alleged on behalf of the plaintiff was that the adoption was invalid as it was made when the boy was 8 years old. The point was referred to the Pandit of the Zilla Court who gave an opinion that a boy who is under 5 years of age and whose head has not been shaved with the usual formalities in his own family is the fittest for selection; but if the tonsure ceremony is performed in the family of adoption the selection indeed is improper but the adoption is not invalid. The Zilla Judge accepted this opinion and dismissed the plaintiff's suit. On appeal to the Provincial Court, this decision was reversed the Pandit of that Court being of opinion that the adoption of a child above 5 years of age was absolutely illegal. The matter came up in second appeal to the Sadar Dewani Adalat and the Pandits of that Court agreed in the view taken in the Zillah Court that such an adoption though improper was not invalid in law. The result therefore was that the decision of the Zilla Court was restored. In 5 Beng. Sel. Rep. 61,⁶ it was held in conformity with the opinion of Pandits that the age of 5 years does not limit the period of eligibility for adoption. In this case, it appears that the adoptee was more than 5 years of age but the ceremony of tonsure was performed by the natural father subsequent to adoption. This was held to be an indifferent act done by a stranger who had no rights whatsoever.

5. (1806) 1 Beng. Sel. Rep. 213, Kerut Narayan v. Mt. Bhovinesree.

6. (1830) 5 Beng. Sel. Rep. 61, Mt. Dullabh Dey v. Manu Biby.

a The Judge who decided the case in the Court below remarked in his judgment :

"From the translation of Dattaka Chandrika it appears that among Brahmins and Kshatriyas adoption of a boy whose age exceeded 5 years (if uninvested with characteristic cord) was legal."

This decision was pronounced in the year 1830.

The point came up for consideration again 8 years later in 6 Beng. Sel. Rep. 271.⁷ One of the two questions that were referred to the Pandits of the Sadar Court was as follows :

"Is adoption restricted to any particular age by the Shastras and if so, is the law respecting the particular age applicable to all or only to some of the Hindu tribes?"

b The answer given to this question was that the period fixed for adoption with respect to the three superior tribes Brahmins, Kshatriyas and Vaisyas was prior to the investiture with their respective cords : with respect to Sudras to their contracting marriage. The Pandits purported to quote certain passage from Dattaka Mimamsa but they were really taken from Dattaka Chandrika which laid down that the expression "chudadya" (चूडाद्या) occurring in Kalika Puran means commencing with upanayan in the case of three higher castes and marriage in the case of Sudras. This decision was followed in (1853) S. D. A. 553.⁸ There is no other reported decision since then where a contrary view has been taken. The view of Dattaka Chandrika as enunciated above can certainly be said to conform to the usages in this province.

a Among the other High Courts in India the question was considered by the Allahabad High Court in 9 ALL. 253⁹ at p. 254, where Mahmood J. discussed all the relevant authorities of Hindu law on this point with elaborate fullness. It was held that the authority of the text of Kalika Puran which lays down that a child must not be adopted whose age exceeds 5 years was extremely doubtful. Even assuming it to be genuine, the interpretation given to the text in the Dattaka Mimamsa was not necessarily intended to be universally applicable and admits of a construction which would confine an application of the text to Brahmins intended for the priesthood; and according to Hindu law as observed by the Benares School the ceremony of upanayan representing as it does the second birth of the boy and the beginning of his initiation in the duties of his tribe is also the ultimate limit of time when a valid adoption in the Dattaka form can take place. This view has been fol-

lowed by the Patna High Court in 2 Pat. 469¹⁰ and 5 Pat. 777.¹¹ In 35 ALL. 263,¹² it was held that among the Abirs (who are Sudras) the adoption of a son after marriage is not permissible. In Madras, several exceptions have been engrafted upon the rule on the basis of custom and according to such custom the adoption of a boy of the same gotra even after his upanayan has been performed in the family of birth is valid but not after his marriage : *vide* Mayne's Hindu Law, Edn. 10, p. 249. In Western India, the view taken from the beginning is different and it does not recognise any restriction arising out of age or initiatory ceremonies in the family of birth. So far as this province is concerned, it may be said therefore that the view has been uniformly held that the adoption of a son belonging to the twice-born classes after he is invested with sacred thread in the family of his birth is not valid. I accordingly agree with my learned brother that the decision of the Court below is right and this appeal should be dismissed.

R.K.

Appeal dismissed.

10. ('23) 10 A.I.R. 1923 Pat. 423 : 72 I. C. 230 : 2 Pat. 469 : 4 P.L.T. 427, Raja Mukunda Deb v. Sri Jagannath.

11. ('27) 14 A.I.R. 1927 Pat. 61 : 101 I. C. 289 : 5 Pat. 777 : 8 P. L. T. 510, Chandreswar Prosad v. Bisheswar Patra.

12. ('13) 35 All. 263 : 18 I. C. 960 : 11 A. L. J. 293, Jhunka Prasad v. Nathu.

A. I. R. (31) 1944 Calcutta 272

R. C. MITTER AND BLANK JJ.

Joy Chand Seraogi and another —

Plaintiffs — Appellants

v.

Dole Gobinda Das and others —

Defendants — Respondents.

Appeal No. 147 of 1941, Decided on 28th January 1944, from original decree of Sub-Judge, Murshidabad, D/- 28th February 1941.

(a) Benami — Proof of — Onus.

Where the conveyance stands in the name of a person the apparent state of things must be presumed to be the real, and he who alleges benami must in the first instance adduce such evidence as would rebut that presumption. [P 276d]

(b) Benami — Conveyance in name of wife— Essentials for proving transaction to be benami indicated.

Where the conveyance stands in the name of the wife, the fact of possession of the property and of the title deeds would afford no certain criterion on the question whether the conveyance is benami in the name of the wife. The fact that rent receipts were issued in the name of the wife or that she figured as plaintiff in rent suits against the tenants or that the record of rights showed her name as the owner would not also be of much importance, for those circum-

7. (1838) 6 Beng. Sel. Rep. 271, Bullav Kant v. Kishen Prea Dasi.

8. (1853) S. D. A. 553, Rani Nitra Dayee v. Bhola-nauth.

9. ('87) 9 All. 253, Ganga Sahai v. Lekhranj.

stances would be in accordance with benami usage. The apparent state of things would ordinarily be kept up. The material points for consideration would be as to who paid the price, and the conduct of the parties. The fact that it is a common practice in Bengal for husbands to acquire properties in the benami of their wives and that the husband had in the past employed his wife as benamidar would be matters for consideration but by themselves they would not establish that the property which is the subject of conveyance had been acquired by husband in the benami of his wife. [P 276d,e,f]

(c) **Contract—Joint debtors—One of debtors released or suit against him dismissed — Right of debtors satisfying debt for contribution against released debtor.**

The release of one of the debtors by the creditor does not prevent the other debtor who has satisfied the debt from claiming contribution from the released debtor. Nor does the dismissal of the creditor's suit against one of the two co-debtors bar the debtor against whom the decree was passed from claiming contribution from his co-debtor against whom the suit had been dismissed if he either satisfied the decree or the decree was satisfied by execution levied against his property. The right to contribute depends upon the fact that at the time the obligation was incurred it was a common liability of the two and on the further fact that it had been discharged either wholly by one of them or partly by him but in excess of his share. The common liability creates a collateral liability amongst the co-debtors depending upon the community of the burden and the benefit from the payment by one of them either wholly or in excess of his share : ('18) 5 A. I. R. 1918 Mad. 1030 (F.B.); ('42) 29 A. I. R. 1942 P. C. 50; ('15) 2 A.I.R. 1915 Mad. 675 and ('27) 14 A. I. R. 1927 Cal. 665, *Rel. on.* [P 277b,c]

(d) **Res judicata — Co-defendants.**

Where the husband and wife were impleaded as defendants in the rent suits as co-debtors and no cross issue on the point of benami was raised by them in those suits, the finding in those suits that the wife was the sole beneficial owner cannot operate as res judicata between the husband and wife : ('31) 18 A.I.R. 1931 P.C. 114, *Rel. on.* [P 277e,f]

C. P. C. —

('44) Chitaley, S. 11, N. 46 Pt. 5.

('41) Mulla, Page 63, Note "Res judicata co-defendants."

(e) **Res judicata — Co-defendants — Suit by one for reimbursement against other—Principle of res judicata applies.**

The principle of res judicata as between co-defendants applies to a suit for reimbursement filed by one co-defendant against another subsequently. [P 277f]

C. P. C. —

('44) Chitaley, S. 11, N. 46.

('41) Mulla, Page 63, Note "Res judicata co-defendants."

(f) **Contract — Contribution and reimbursement—Distinction.**

The only difference between contribution and reimbursement is that in the former case one discharges his as well as another's liability and in the latter case he discharges the liability which is wholly the other's not voluntarily but under conditions which give him a legal right to recoup himself. [P 277f,g]

(g) **Contract Act (1872), S. 69—Phrase "bound by law to pay" in S. 69 — Meaning of.**

The phrase "bound by law to pay" in S. 69 does not contemplate personal liability only but all liabilities to payment for which owners are indirectly liable, that is, liabilities imposed upon the land itself of which they are the owners. Consequently where a suit to recover rent in respect of a darpatni was decreed against benamidar A but was dismissed against owner B, owner B would be a person "bound by law to pay" the decretal amount for though he is not under a personal liability to pay the decretal amount as the decree did not make him liable the liability is on the property, namely, the darpatni of which he is the owner : 4 Cal. 369, *Rel. on.*; *Case law discussed.* [P 278a,b]

(h) **Contract Act (1872), S. 70—Person seeking to recover on basis of S. 70 must have acted bona fide.**

A person seeking to recover on the basis of S. 70 must have acted bona fide. If he had made a payment of money which had benefited another, he cannot recover it from the latter, if he had made the payment mala fide—say with the object of creating evidence of title. [P 280c]

(i) **Interpretation of statutes — Principles of equity—Applicability of—They cannot control statutory provisions.**

Statutory provisions cannot be controlled by or whittled down by the general principles of equity, justice and good conscience. Those principles can have application in India on the field outside statutory provisions. If there is a statutory provision on the subject the plaintiff would succeed or fail according as his case satisfies or fails to satisfy the statutory requirements. If his case comes within S. 69, Contract Act, he is entitled to succeed and he cannot be denied relief by taking the aid of general maxims of equity: (1861) 1 B. & S. 393, *Ref.*; ('36) 23 A. I. R. 1936 Cal. 663, *Not approved.* [P 280h; P 281a]

C. P. C. —

('44) Chitaley, Preamble, N. 7 Pts. 13 and 14.

(j) **Res judicata — Pure question of law — Decision on, if can operate as res judicata.**

A pure question of law, a point of law in an academic form, can never be in issue between litigants. The point in issue must necessarily relate to the rights of the parties to the suit, and the determination of those rights, may depend upon the determination of facts as well as on points of law. What the rule of res judicata bars is the re-agitation between the self-same parties or their privies of the self-same issue, which was directly and substantially in issue between them in the previous suit: ('28) 15 A. I. R. 1928 Cal. 777 (F.B.), *Expl. and Rel. on.* [P 281d,e]

C. P. C. —

('44) Chitaley, S. 11, N. 11 Pt. 5.

('41) Mulla, Page 58 Pt. (d).

(k) **Res judicata — Co-defendants — Pro forma defendant.**

There can be no res judicata between a defendant and a pro forma defendant: 12 Cal. 580 (F.B.), *Rel. on.* [P 281f]

C. P. C. —

('44) Chitaley, S. 11, N. 46 Pt. 18.

('41) Mulla, P. 65 Pt. (a).

(l) **Res judicata — Previous suit to recover patni rent deposited by plaintiffs—Subsequent suit to recover darpatni rent deposited by plaintiffs against same person—Decision in previous suit cannot operate as res judicata.**

A decision in a previous suit to recover the patni rent deposited by the plaintiffs which saved the patni

- a from sale cannot operate as *res judicata* in the subsequent suit by the plaintiffs against the same person to recover the darpatni rent deposited by them which saved the darpatni from a rent sale because the rights claimed in the two suits are altogether different.

[P 281e]

C. P. C. —

('44) Chitaley, S. 11, N. 72.

('41) Mulla, Page 46, Note "Subject-matter . . . different."

(m) *Res judicata*—Court in previous suit not having pecuniary jurisdiction to try subsequent suit—Decision in previous suit cannot operate as *res judicata*.

- b Where the Munsif in the previous suit would have had no jurisdiction to try the subsequent suit on account of his limited pecuniary jurisdiction, the final decision in that suit cannot operate as *res judicata* in the subsequent suit.

[P 281f,g]

C. P. C. —

('44) Chitaley, S. 11, Notes 73; 78.

('41) Mulla, Page 73, Pts. (q), (r); Page 74, Note "First as to pecuniary limit."

Atul Chandra Gupta and Rabindranath Bhat-tacharjee — for Appellants.

Rama Prosad Mookerjee, Muktipada Chatterjee and Binayendra Deb Rai Mahasai —
for Respondents.

- Judgment.**—The facts of the case, which are material for this appeal are as follows: Four annas share of Touzi No. 199 of the Murshidabad Collectorate belonged to Nawab Bahadur of Murshidabad, as mutwalli of a wakf estate. In August 1901, he as mutwalli settled the same in patni right to Daiba Kumari Debi and others, the executors to the estate of Indra Nayaran Singh at an annual rent of Rs. 2369. For brevity's sake this patni would hereafter be called the "four anna patni." The said executors in their turn settled the same in darpatni right to Tarini Prosad Dhur at an annual rent of Rs. 2369 on 29th April 1905. This darpatni would for brevity's sake be hereafter called the "four anna darpatni." There was a covenant in the darpatni kabuliat (Ex. 11) by which the darpatnidar undertook to pay by barat the patni rent to the Nawab Bahadur of Murshidabad. Tarini Prosad Dhur in his turn granted three separate sepatnis to three persons at different dates of different portions of his darpatni lands. One of such sepatnidars was Adhar Chandra Mondal. He did not, however, grant sepatnis in respect of all the lands of his darpatni-taluk but retained a portion thereof in khas management. After his death his heirs, Bishnu Das Dhur and others granted on 1st September 1923 all those lands of the darpatni, which their father had held in khas, in sepatni to Joy Chand Serogi, Keshori Mull Serogi and Chatturbhuj Serogi by taking a large amount of money as selami. Thus after this grant all the lands of the darpatni were
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let out in sepatni right to four sets of persons. The total rent of all the four sepatnis came up to Rs. 2256-9-0. It was thus less than the darpatni rent (Rs. 2369) payable by the heirs of Tarini Prosad Dhur to the patnidar Daibakumari Debi and others. This loss was made up by those persons from the patni which they had in respect of the other twelve annas share of the said touzi which was owned by the executors of Indra Narayan Singh. This patni would hereafter be called the "twelve anna patni." It is not necessary for this appeal to narrate the history of the said patni of the twelve annas share of the said touzi or the darpatnis carved out of the same.

On 8th Falgoun 1330 (=21st February 1924) the heirs of Tarini Prosad Dhur sold their aforesaid "four anna darpatni and their twelve anna patni." The name of defendant 2, Nerode Barani Dasi, who is the wife of defendant 1, Dolegobinda Dass, appeared as the purchaser in this conveyance. On 5th Kartic 1336 (=20th October 1929) Nirode Barani Dasi sold the "twelve anna patni" to Amano Burmaniya. There thus remained with her the unprofitable "four anna darpatni." On 6th February 1929, the "four anna patni" was purchased by Sardi Bai, wife of plaintiff 1, Joy Chand Serogi. The finding of the learned Subordinate Judge is that Sardi Bai was the benamidar of her husband Joy Chand Serogi and that finding has not been challenged before us by any of the parties. At a partition between Joy Chand Serogi and his brother Kishorimull Serogi, the interest of Kishorimull in the sepatni which they and Chatturbhuj Serogi held under the four anna darpatni fell to the share of Joy Chand Serogi. This partition was after 15th May 1937 but before the institution of the suit in which this appeal arises. From after the date of that partition Joy Chand Serogi and Chatturbhuj Serogi became the owners of the said sepatni. They are plaintiffs 1 and 2 in the suit and Kishorimull Serogi is pro forma defendant 3.

The owners of the "four anna patni," Daibakumari and others, had given on the "four anna darpatnidar" the barat to pay the patni rent due for the same to the Nawab Bahadur of Murshidabad. The darpatnidar of the four anna darpatni, who was ostensibly Nirode Barani Dasi, did not however pay the patni rent on several occasions. The sepatnidar Adhar Chandra Mondal deposited the same on two occasions to save the four anna patni from the summary sale under Regn. 8 of 1819—once in November 1928 and the second time in November 1929. His interest pro-

a mpted him to do so, for, if the said patni had been sold at those summary sales, the purchaser would have had the right to annul his sepatni. He brought two suits against Nirode Barani and her husband Dolegobinda Dass for recovering the amounts deposited by him. In those two suits he made the patnidar of the "four anna patni" as also the other sepatnidars, Joy Chand Serogi and others, holding under the "four anna darpatni" parties defendants. His suits were ultimately dismissed against Nirode Barani and Dole Gobinda. The judgment of this Court is reported in 40 C. W. N. 1037.¹ There was again b default in the payment of rent due for the "four anna patni." This time a sale was held under Regn. 8 of 1819 at which Joy Chand Serogi purchased the said patni, but this sale was set aside at the suit of Adhar Chandra Mondal. If the sale had not been set aside Joy Chand would have been in a position to annul the three sepatnis, which were all profitable ones and would have certainly annulled those three sepatnis. As a sale of the "four anna patni" either in execution of a rent decree or under Regn. 8 of 1819 would have imperilled the sepatnis including the sepatni of Joy Chand and his cosharers Joy c Chand purchased by private treaty the patni which was not profitable (for the darpatni rent was equal to the patni rent) in the name of his wife Sardi Bai, by paying Rs. 100 as its price. He thus acquired control of the field to a certain extent.

After Sardi Bai had become the ostensible owner of the "four anna patni," the patni rent due in respect thereof for the last six months—Augryan to Chaitra—of 1340 B. S. = October 1933 to April 1934) was not paid to the Nawab Bahadur of Murshidabad with the result that the latter applied for sale of the said patni under Regn. 8 of 1819. That d sale was avoided by Kishorimull Serogi and Chatturbhuj Serogi depositing with the Collector the arrears due to the Nawab Bahadur in their character as some of the sepatnidars under that patni. They again saved the said patni from a summary sale under that regulation for the arrears of rent for the first six months—Bysack to Kartic of the year 1341 B. S. (April 1934 to October 1934). For recovering the amounts so deposited they instituted two suits, Nos. 581 of 1934 and 957 of 1935, in the first Court of the Munsif at Berhampore, against Nirode Barani and Dolegobinda Dass. In those suits they alleged

that Dolegobinda Dass was the beneficial owner of the "four anna darpatni," Nirode Barani being his benamidar. They contended that as the darpatnidar had covenanted with the patnidar to pay the patni rent due to the zamindar, the darpatnidar who according to them was Dolegobinda, was liable to pay them what they had deposited in payment of the patni rent. The learned Munsif found that Dolegobinda was the beneficial owner of the darpatni. He granted decrees against Dolegobinda only. His decrees were affirmed on appeal by the learned Subordinate Judge on 8th June 1936. On second appeals to this Court the suits were dismissed against Dolegobinda f but decreed against Nirode Barani. The judgment of this Court was delivered on 7th March 1939. It is Ex. D (4).

In 1933 Sardi Bai as patnidar of the "four anna patni" had instituted a rent suit (Rent Suit No. 8 of 1933) in the Court of the Subordinate Judge at Berhampore (subsequently numbered 1 of 1934 on transfer to the additional Court of the Subordinate Judge of the same place) for the rent due for the year 1337 B. S., on account of the four anna darpatni. This suit was brought against both Nirode Barani and Dolegobinda. In that suit she prayed for a decree against Dolegobinda on g the allegation that he was the beneficial owner of the darpatni, Nirode Barani being his benamidar. On 24th April 1934 the Subordinate Judge granted a decree against both on the finding that Dolegobinda was the beneficial owner of the darpatni and Nirode Barani was his benamidar (Ex. 6). The appeal filed by Dolegobinda was allowed by the learned District Judge on 8th May 1935 (Ex. D (1)), he holding that Nirode Barani was the beneficial owner and not the benamidar for her husband. The judgment of the learned District Judge was upheld in second appeal by this Court which delivered its judgment h on 16th July 1937 (Ex. D (2)). The finding of the Subordinate Judge that Dolegobinda had no interest in that darpatni thus remained. It is after this judgment that the second appeals preferred against the decrees passed in the other two suits instituted by Kishorimull and Chatturbhuj Serogi for reimbursement of the moneys they had deposited to prevent the sale of the "four anna patni" (Suits Nos. 581 of 1934 and 957 of 1935) were disposed of by this Court.

In 1935 Sardi Bai filed another suit (Rent suit No. 3 of 1935) in the Court of the Subordinate Judge, Berhampore against Dolegobinda and Nirode Barani for arrears of rent due for the years 1338 to 1341 B. S. In

1. ('36) 23 A. I. R. 1936 Cal. 663; 167 I. C. 604; 63 Cal. 1172; 40 C. W. N. 1037; 63 C.L.J. 289, Adhar Chandra Mondal v. Dol Gobinda Das.

a respect of the "four anna darpatni" on the same allegations as in Rent Suit No. 8/1 of 1933/1934. That suit was decreed against Nirode alone, Dolegobinda being absolved on the finding that Nirode Barani was not his benamidar. Sardi Bai, the decree-holder in those two suits, put her decrees into execution against Nirode Barani. She applied for sale of the defaulting tenure—"the four anna darpatni"—under the procedure laid down in Chap. XIV, Ben. Ten. Act. The defaulting tenure was attached and advertised for sale. Chatturbhuj Serogi (plaintiff 2) and Kishorimull Serogi (pro forma defendant 3) deposited the amounts for which the executions had been taken out and so averted the sale of the tenure, Rs. 4358 odd was deposited by them on 18th February 1937, which satisfied the dues of the decree-holder under the decree passed in Rent Suit No. 8 of 1933/1 of 1934 and Rs. 10,883 odd was deposited by them on 15th May 1937, which satisfied the dues of the decree-holder under the decree passed in Rent Suit No. 3 of 1935. The rights of pro forma defendant 3, Kishorimull Serogi, have passed to plaintiff 1, Joy Chand Serogi, by the terms of the partition deed executed by him and his brother Kishorimull. The suit in which this appeal arises is for the recovery of the said moneys from Dolegobinda and Nirode Barani. As sepatni rent was due by the plaintiffs, they have deducted the same from the amount deposited by them and have prayed for a decree for the balance. The learned Subordinate Judge has found that Dolegobinda has acquired "the four anna darpatni" in the benami of his wife, Nirode Barani. He has, however, dismissed the suit against both Dolegobinda and Nirode Barani. Even if his conclusions on the points of law be correct, it is difficult to realise why the suit has been dismissed against Nirode Barani. Important questions of law have been raised and discussed before us in an elaborate way by both the learned advocates. They would arise, if it be held that Nirode Barani was the benamidar for her husband, Dolegobinda, in respect of the "four anna darpatni." We will therefore consider that question first.

As the conveyance stands in the name of Nirode Barani the apparent state of things must be presumed to be the real, and he who alleges benami must in the first instance adduce such evidence as would rebut that presumption. Having regard to the fact of relationship between the parties, the fact of possession of the property and of the title deeds would afford no certain criterion on the question of benami. The fact that rent re-

ceipts were issued in the name of Nirode Barani or that she figured as plaintiff in rent suits against the sepatnidars or that the record of rights showed her name as the owner would not also be of much importance, for those circumstances would be in accordance with benami usage. The apparent state of things would ordinarily be kept up. The material points for consideration would be as to who paid the price, and the conduct of the parties. The fact that it is a common practice in Bengal for husbands to acquire properties in the benami of their wives and that Dolegobinda had in the past employed his wife as benamidar (see some of the items of property mentioned in the partition deed Ex. J) would be matters for consideration, but by themselves they would not establish that the "four anna darpatni" had been acquired by Dolegobinda in the benami of his wife. (After considering the evidence their Lordships proceeded.) On the evidence as it stands we hold that Nirode Barani was the benamidar of Dolegobinda in respect of the four anna darpatni. In arriving at this conclusion, we have not taken into consideration Nirode Barani's evidence. The plaintiffs adopted a procedure which must be condemned. The learned Subordinate Judge also acted illegally in giving in advance to the commissioner the power to allow the plaintiffs to declare her hostile and to cross-examine her. Moreover her deposition is incomplete and for that reason alone her evidence has to be expunged from the record.

The findings in the judgment delivered in Rent Suits Nos. 1 of 1934 and 3 of 1935 on the question of benami are not *res judicata* as plaintiff 2 and pro forma defendant 3 of the suit before us through whom plaintiff 1 claims were not parties to those rent suits. No doubt Joy Chand Serogi brought those rent suits in the name of his benamidar Sardi Bai, but he had brought those suits under a different title, namely, as the patnidar. On the finding that Nirode Barani is the benamidar of her husband Dolegobinda the following points of law arise in this appeal: (1) Whether the plaintiffs can obtain from Dolegobinda reimbursements of the amounts deposited by which the decrees passed in Rent Suit No. 8 of 1933/1 of 1934 and No. 3 of 1935 were satisfied, seeing that these rent suits were dismissed against Dolegobinda after contest?

If the aforesaid question is answered against the plaintiffs no further question would arise. If however the said question is answered in their favour three further questions would arise for consideration. They are: (2) Whe-

a ther plaintiff 2 and pro forma defendant 3 acted bona fide in satisfying the two rent decrees? (3) Can the plaintiffs recover the amounts seeing that at the time of those deposits they had not paid the sepatni rent due from them? and (4) Is the plaintiffs' claim barred by res judicata?

The first question has to be considered from two aspects: (a) Whether the fact that those rent suits were dismissed against Dolegobinda would by itself defeat the plaintiffs' claim and (b) whether the fact that Dolegobinda was not under a personal obligation to satisfy those decrees, as these decrees did not make him liable, would defeat the plaintiffs' claim. We propose to consider the aforesaid questions in the order stated above.

I (a). In cases of contribution between co-debtors the position is settled. The release of one of the debtors by the creditor does not prevent the other debtor who has satisfied the debt from claiming contribution from the released debtor. 40 Mad. 968² at p. 975, I.L.R. (1942) ALL. 608 at p. 620=47 C.W.N. 1³ at p. 7. It is also the law that the dismissal of the creditor's suit against one of the two co-debtors would not bar the debtor against whom the decree was passed from claiming contribution from his co-debtor against whom the suit had been dismissed if he either satisfied the decree or the decree was satisfied by execution levied against his property. The right to contribute depends upon the fact that at the time the obligation was incurred it was a common liability of the two and on the further fact that it had been discharged either wholly by one of them or partly by him but in excess of his share. The common liability creates a collateral liability amongst the co-debtors depending upon the community of the burden and the benefit from the payment by one of them either wholly or in excess of his share, 39 Mad. 288⁴ and 31 C.W.N. 985.⁵ If, therefore, Nirode Barani was the beneficial owner of a share only of the four anna darpatni and benamidar for Dolegobinda for the remaining share, the dismissal of the rent suit No. 8 of 1933/1 of 1934 and No. 3 of 1935 against Dole-

gobinda would not have prevented her from claiming contribution from Dolegobinda, after establishing that Dolegobinda had a share in the said darpatni, if the decretal amounts had been realised from her property or if she had satisfied the decrees. She would only be debarred if in the suit for contribution she would be barred from proving that Dolegobinda was the beneficial owner of a share by reason of the finding that she was the sole beneficial owner and not benamidar of Dolegobinda made in those rent suits operating as res judicata. These findings could not have been res judicata, for she and Dolegobinda were co-defendants in those rent suits and no cross issue on the point of benami was raised by them in these suits. The requirements for res judicata as between co-defendants as laid down in 58 I. A. 158⁶ are not satisfied. The question then is whether the aforesaid principles are rendered inapplicable to a suit for reimbursement. We do not think that they are inapplicable. The only difference between contribution and reimbursement is that in the former case one discharges his as well as another's liability and in the latter case he discharges the liability which is wholly the other's not voluntarily but under conditions which give him a legal right to recoup himself. As the dismissal of the rent suits against Dolegobinda would not have prevented Nirode Barani from getting reimbursement from Dolegobinda after satisfying those decrees, that fact cannot disentitle the plaintiffs from recovering the same from Dolegobinda, if they are otherwise entitled to recover the same.

I (b). The advocate for the plaintiffs has relied upon s. 69, Contract Act, for supporting his clients' claim against Dolegobinda. Plaintiff 2 and pro forma defendant 3 who deposited the two sums of money which satisfied the two rent decrees were persons who were undoubtedly interested in the payment of the decretal amounts, for if the decrees had not been satisfied, the purchaser at the sale in execution of those decrees would have been in a position to annul their sepatni. The whole question therefore is whether Dolegobinda is a person "bound by law to pay" the amounts covered by those decrees. He was under no personal liability to pay the sums decreed as both the rent suits had been dismissed against him. But in execution of those decrees "the four anna darpatni" of which he is the beneficial owner could have been sold. The phrase "bound by law to pay" was first construed in

2. ('18) 5 A.I.R. 1918 Mad. 1030 : 42 I. C. 352 : 40 Mad. 968 : 33 M. L. J. 211 (F.B.), Perumall Pillai v. Raman Chettiar.

3. ('42) 29 A.I.R. 1942 P. C. 50 : 202 I. C. 265 : I. L. R. (1942) All. 608 : 47 C. W. N. 1 : I. L. R. (1942) Kar. P. C. 99 : 69 I. A. 98 (P.C.), Shah Ram Chand v. Parbhu Dayal.

4. ('15) 2 A.I.R. 1915 Mad. 675 : 27 I. C. 337 : 39 Mad. 288 : 27 M. L. J. 746, Abraham Servai v. Raphial Muthirian.

5. ('27) 14 A.I.R. 1927 Cal. 665 : 104 I. C. 206 : 45 C. L. J. 571 : 31 C. W. N. 985, Behary Lal Sen v. Indra Narayan.

6. ('31) 18 A.I.R. 1931 P. C. 114 : 132 I. C. 598 : 58 I. A. 158 : 53 All. 103 (P.C.), Munni Bibi v. Trilokinath.

a 4 Cal. 369.⁷ In that case Markby J., held that that phrase did not contemplate personal liability only but all liabilities to payment for which owners are indirectly liable, that is, liabilities imposed upon the land itself of which they are the owners. This view has been followed in a series of decisions of this Court as well as of other High Courts, 23 C. L. J. 125;⁸ 30 C.W.N. 366;⁹ A.I.R. 1926 Cal. 765¹⁰ and I.L.R. (1940) ALL. 71.¹¹ On the view taken in those cases, Dolegobinda would be a person "bound by law to pay" the decretal amounts, for though he was not under a personal liability to pay the same, the liability was on the property, namely, "the four anna darpatni," b of which he is the owner.

Mr. Mookerjee, who appears for Dolegobinda, contends, firstly that the above-mentioned decisions have wrongly interpreted the phrase "bound by law to pay" occurring in S. 69, Contract Act, and secondly, that the view, taken in these decisions is in conflict with other decisions of Division Benches of this Court. The cases on which he has placed reliance are 30 Mad. 35,¹² 33 Mad. 41,¹³ 24 Mad. L.J. 548,¹⁴ 11 C.W.N. 403¹⁵ and the judgment of S. K. Ghosh and Mukherjea JJ. in *Dolegobinda Dass v. Chatturbhuj Serogi* (Exhibit D-4). In 30 Mad. 35,¹² it was held that an unregistered proprietor of a revenue paying estate is a person whose interest is to pay the land revenue to save his property from revenue sale but he is not a person "bound by law to pay" the revenue, though revenue is a charge on the property; and so the registered proprietor, who had paid revenue at a time when a litigation about title was pending between him and the unregistered proprietor cannot recover the money paid by him from the latter under S. 69, Contract Act, and 33 Mad. 41¹³ followed the interpretation given

in 30 Mad. 35¹² to the phrase "bound by law to pay." The decisions in those two cases are in conflict with the decision in 4 Cal. 369,⁷ 23 C.L.J. 125⁸ and 30 C.W.N. 366.⁹ Those Madras cases were cited in A. I. R. 1926 Cal. 765¹⁰ but were not approved by a Division Bench of this Court. We cannot agree with those two decisions of the Madras High Court nor with the decisions of the same Court in 24 Mad.L.J. 548.¹⁴ If the plaintiff in the last mentioned case could not have recovered the revenue paid by him from the defendant on the view that S. 69, Contract Act, did not help him we fail to see how he could have a charge for his claim on the defendant's share in the property f in respect of which the revenue was paid by him.

The two cases decided by Division Benches of this Court to which our attention has been drawn by Mr. Mukherjee will have to be examined carefully, for if they are in conflict with the other decisions of this Court, which we have noticed above the point of law will have to be referred to the Full Bench. In 11 C.W.N. 403¹⁵ the first mortgagee had recovered a decree on his mortgage and in execution thereof had purchased the mortgage properties. In his suit he did not, however, implead the second mortgagee and some persons who had acquired a share in the equity of redemption. The second mortgagee had sued on his mortgage without impleading the first mortgagee, obtained a decree and in execution thereof had purchased what had been mortgaged to him. His security included some of the properties included in the first mortgage. His purchase at the court sale was prior to the purchase of the first mortgagee. The first mortgagee after his purchase brought a suit for possession impleading the second mortgagee and two other persons who before his mortgage suit had acquired interest in the equity of redemption but had not been impleaded as defendants in the mortgage suit. It was held that the suit for possession by the first mortgagee was maintainable but the puisne mortgagees and those other persons who had acquired interest in the equity of redemption at the time when the first mortgagee instituted his suit to enforce his mortgage and who had been left out in that suit could exercise their right of redemption in that suit for possession. It is not necessary to express any view whether the view that that suit for possession was maintainable was correct in view of the decision of the Judicial Committee in 51 C.L.J. 70.¹⁶ We may only state that it has

a 7. ('79) 4 Cal. 369, Mothooranath Chattopadhyaya v. Kristo Kumar Ghose.

8. ('16) 3 A.I.R. 1916 Cal. 954 : 32 I.C. 200 : 23 C.L.J. 125, Chandradaya Sen v. Bhagaban Chandra Sen.

9. ('26) 13 A. I. R. 1926 Cal. 657 : 94 I.C. 159 : 30 C. W. N. 366, Registered Jessore Loan Co. Ltd. v. Gopal Hari Ghose.

10. ('26) 13 A.I.R. 1926 Cal. 765 : 94 I.C. 811 : 43 C.L.J. 142, Sarajubala Roy v. Kamini Kumar.

11. ('40) 27 A. I. R. 1940 All. 104 : 186 I.C. 519 : I.L.R. (1940) All. 71 : 1939 A. L. J. 1121, Nandan Sahu v. Fateh Bahadur Singh.

12. ('07) 30 Mad. 35 : 16 M. L. J. 569 : 1 M. L. T. 323, Boja Sellappa Reddy v. Vidhachala Reddy.

13. ('10) 33 Mad. 41 : 3 I.C. 624 : 19 M.L.J. 627 : 6 M.L.T. 198, Subramanya Chetti v. Mahalingaswami Sivan.

14. ('13) 36 Mad. 493 : 15 I.C. 262 : 24 M.L.J. 548, Puthenpurayal Ammal v. Pakram Haji.

15. ('07) 11 C. W. N. 403 : 5 C.L.J. 315, Gangadas Bhattar v. Jogendra Nath Mitter.

16. ('29) 16 A.I.R. 1929 P. C. 288 : 120 I. C. 650 : 51 C.L.J. 70 (P.C.), Bijay Saran v. Bageswari Prasad.

a not been approved in subsequent decisions of this Court. 38 C.W.N. 1178,¹⁷ and 45 C.W.N. 530.¹⁸ Then the question arose as to the terms of redemption. It was held that from the date of the mortgage decree obtained by the first mortgagee interest was not to be calculated at the bond rate but at the rate mentioned in that decree. This part of the judgment also has not been approved in a later decision of this Court : 49 Cal. 626.¹⁹

It was further held that in fixing the price for redemption the puisne mortgagee could not claim credit in the accounts for the sum of money, which he had deposited under S. 171, b Ben. Ten. Act, to satisfy a rent decree in respect of the mortgage property. Although no reference was made to S. 69, Contract Act, the language used in the judgment makes it quite clear that the learned Judges had in mind that section. They held that the plaintiff, who at the time of that deposit by the puisne mortgagee was only a mortgagee, was not a person bound in law to pay the rent decree. We cannot brush aside this part of the judgment simply because other parts of the judgment dealing with other points of law have not been approved in later decisions of this Court. One fact, however, is significant, c namely, that 4 Cal. 369⁷ was not noticed in the judgment which was delivered by one of the most erudite Judges of this Court. That omission, in our opinion, furnishes a clue to the interpretation of this part of the judgment on which Mr. Mookerjee has relied. If a person is personally liable he is "bound by law to pay." The first mortgagee, the plaintiff in that case, did not come within that category, for under the Indian law there is no privity between the mortgagee of a leasehold property and the landlord. In 4 Cal. 369⁷ it was laid down that the owner of a property was also "bound by law to pay" if that particular d property of his for which another has paid, was liable to pay that sum, even if the owner was under no personal liability to pay it. The first mortgagee (plaintiff) did not also fall within that class, as he was not at the time of the deposit by the puisne mortgagee the owner of the property. That in our judgment is the meaning and effect of that decision. It did not therefore lay down a proposition of law

which was in direct conflict with the decision e in 4 Cal. 369.⁷

The next decision to which our attention has been drawn by Mr. Mookerjee was in the case in *Dolegobinda Dass v. Chaturbhuj Serogi and others* (Ex. D-4). In that case Chaturbhuj Serogi and Kishorimull Serogi, two of the sepatnidars of the same sepatni which we have in this case, deposited the patni rent due from Sardi Bai to the Nawab Bahadur of Murshidabad to save the four anna patni from a summary sale under Reg. 8 of 1819. They sued Nirode Barani and Dolegobinda for the amount they had deposited. As in the present case they alleged that Dolegobinda was the f beneficial owner of the "four anna darpatni" and Nirode Barani was his benamidar. They obtained decrees against both in the lower Courts on the finding that Nirode Barani was Dolegobinda's benamidar. Dolegobinda preferred a second appeal to this Court. Before the second appeal was heard, the patnidar (Sardi Bai) had sued Dolegobinda and Nirode Barani for darpatni rent. In that rent suit (No. 1 of 1934) it was held that Dolegobinda had no interest in the darpatni and on that finding the rent suit was dismissed against him. In the second appeal it was contended by Dolegobinda's advocate that the decision in g the rent suit on the question of benami was res judicata. That contention was overruled. Then the learned Judges made the following observations on which Mr. Mookherjee places reliance :

"Though it (the decision in the rent suit) is not binding on the plaintiffs (Chaturbhuj and Kishorimull Serogi) it was binding on the parties to that suit and was between the patnidar on the one hand and Dolegobinda on the other; it must be taken that Dolegobinda was not the darpatnidar and was not liable for the patni rent. That being so, the plaintiffs in our opinion cannot succeed in this suit for reimbursement which is instituted under S. 69, Contract Act, unless he succeeds in showing that Dolegobinda was bound to pay the patni rent." h

In our judgment this passage cannot be construed as going against the view expressed in 4 Cal. 369⁷ unless something is imported into it which the learned Judges had not themselves said. In our judgment, in construing the aforesaid passage, the fact that the darpatnidar had a barat from the patnidar to pay the zamindar the patni rent must be kept in view. It is for that fact the learned Judges observed in the first sentence that Dolegobinda was not liable to pay the patni rent (not darpatni rent) for the reason that the patnidar could not enforce against him the barat arrangement, it being found in a suit between the patnidar and Dolegobinda that the latter was not the darpatnidar. The personal liabi-

17. ('35) 22 A.I.R. 1935 Cal. 139 : 154 I.C. 868 : 62 Cal. 75 : 38 C. W. N. 1178, Jagat Chandra De v. Abdul Rashid.

18. ('41) 28 A. I. R. 1941 Cal. 484 : 198 I. C. 315 : I. L. R. (1941) 1 Cal. 514 : 45 C. W. N. 530 : 73 C.L.J. 435, Sailendra Nath v. Amarendra Nath.

19. ('22) 9 A. I. R. 1922 Cal. 23 : 69 I. C. 759 : 49 Cal. 626, Jnanendra Nath Singh v. Shorashi Charan.

ality of Dolegobinda vis a vis the patnidar to pay the patni rent was thus excluded. In that view the learned Judges held that no other consideration arose on the claim of the plaintiffs which was based on s. 69, Contract Act. In so holding the learned Judges were right, for, there was no question of Dolegobinda's property the darpatni—being liable for the patni rent. The question that was considered by Markby J. in 4 Cal. 369⁷ did not thus arise. There is therefore no conflict between the decision in 4 Cal. 369⁷ and the cases of this Court which have followed it and the decision either in 11 C. W. N. 403¹⁵ or the decision as embodied in Ex. D (4). The question of referring the point to a Full Bench does not accordingly arise. Seeing that since 1878 up to the last case which was decided in the Court in 1926 the words "bound by law to pay" have been construed not only to include personal liability of the "other" but also liability on his property, even when he was under no personal liability to pay, we are not inclined to differ from that view. We accordingly hold that the claim laid by the plaintiffs in the case before us comes within s. 69, Contract Act, and unless otherwise barred they are entitled to recover the amount sued for from Dolegobinda also.

II. It has been held in a series of cases that a person seeking to recover on the basis of s. 70, Contract Act, must have acted bona fide. If he had made a payment of money which had benefited another, he cannot recover it from the latter, if he had made the payment mala fide—say with the object of creating evidence of title. Those decisions are expressly based upon the construction of the word "lawfully" used in that section. That word however does not occur in s. 69. Some of the decisions of the Madras High Court which are reviewed in 53 Mad. 952²⁰ have held that mala fides on the part of the plaintiff would disentitle him to relief even when his claim is based on s. 69, Contract Act. Some of those decisions of the Madras High Court may be explained, having regard to the facts of those cases, on the ground that the plaintiff was not interested in the payment of money as his title deed which gave the appearance of interestedness was fictitious. Be that as it may, even if it be assumed that want of bona fides on the part of a plaintiff, who claims under s. 69 and whose case fulfils all the requirements of that section, would defeat his claim we do not find any materials on the

records of this case which would sustain a finding that in satisfying the two rent decrees plaintiff 2 and pro forma defendant 3 had acted mala fide. They had a vital interest, for their sepatni had been endangered by reason of those rent decrees. There is a presumption against misconduct and the principal defendants have not led any evidence which would rebut that presumption. We accordingly overrule this ground urged by the respondent's advocate.

III. This ground has been urged by the respondent's advocate from two aspects. He says in the first instance that Joy Chand was the patnidar as Sardi Bai has been found to be his benamidar. He further says that the rent decrees which Sardi Bai had obtained against Nirode Barani, the ostensible darpatnidar, were satisfied really by Joy Chand, he having used the names of pro forma defendant 3 and of plaintiff 2 in the applications for deposit of the decretal amounts. On these two facts he urges that there was no payment because Joy Chand, as sepatnidar purported to pay to himself as patnidar. The money did not thus change hands and so there was no payment. This argument proceeds upon the bare assumption, of which there is no evidence, that plaintiff 2 and pro forma defendant 3 did not themselves deposit their own money but Joy Chand used them as pawns.

His second line of argument is that the sepatnidars, namely plaintiff 2 and pro forma defendant 3 being themselves in default in the payment of sepatni rent at the time of the deposits by them which satisfied the two rent decrees cannot in law recover the amounts deposited from the darpatnidar under s. 69, Contract Act. The amount of the arrears of rent for their sepatni have been shown in the plaint itself. It was Rs. 3035-14-0 which falls far short of the amount decreed in Rent Suit No. $\frac{8 \text{ of } 1933}{1 \text{ of } 1934}$ and 3 of 1935 and for which execution had been levied. For supporting his contention he has relied upon the observations in 40 C. W. N. 1037¹ at p. 1050. Those observations seems to us to be obiter dicta, as Dolegobinda was absolved from liability to pay to Adhar Chandra Mondal on the principle laid down in (1861) 1 B. & S. 393.²¹ We are further of opinion that statutory provisions cannot be controlled by or whittled down by the general principles of equity, justice and good conscience. Those principles can have application in India on the field outside statu-

20. ('31) 18 A.I.R. 1931 Mad. 207 : 129 I. C. 463 : 53 Mad. 952 : 60 M.L.J. 13, Nanduri Saradamba v. Parakala Pattabhiramayya.

21. (1861) 1 B. & S. 393 : 30 L. J. Q. B. 265 : 8 Jur (N.S.) 332 : 4 L. T. (N.S.) 468 : 9 W. R. 781 : 124 R. R. 610, Twaddle v. Atkinson.

a tory provisions. If there is a statutory provision on the subject the plaintiff would succeed or fail according as his case satisfies or fails to satisfy the statutory requirements. If his case comes within S. 69 he is entitled to succeed and he cannot be denied relief by taking the aid of general maxims of equity. There is the further fact why we do not consider ourselves bound by any precedent on the point because it does not appear whether the arrears of sepatni rent due from Adhar Chandra Mondal to the darpatnidar were less than what he had paid on account of the patni rent in arrears which saved the patni. It may well be that his arrears had exceeded that amount. We have looked into the paper book of that case but from it we could not ascertain what his arrears were at the time when he deposited the patni rent. We accordingly decide this point also against the respondent.

IV. The point of res judicata urged by the respondent has been based on two decisions of this Court. The first is the decision in the suits which Adhar Chandra Mondal brought to recover from Dolegobinda and Nirode Barani the patni rent that he had paid to save the "four anna patni." That decision is reported in 40 C. W. N. 1037.¹ The second decision is the decision of this Court as embodied in Ex. D (4). That was in the two suits which Chatturbhuj Serogi and Kishorimull Serogi had brought against Dolegobinda and Nirode Barani to recover the patni rent which they had paid to save the "four anna patni" from sale. In both the suits the subject-matter was the money paid towards patni rent. The suit before us concerns money paid to satisfy decrees for arrears of darpatni rent. All those suits were dismissed against Dolegobinda. We do not consider that the decisions in those suits bar the plaintiffs from recovering a decree against Dolegobinda on the ground of res judicata.

The learned advocate for the respondents urges that even if those decisions are erroneous in point of law they operate as res judicata. In support of this contention he relies upon the Full Bench decision in 56 Cal. 723.²² In that case, however, Rankin C. J. made the position quite clear. He pointed out that a pure question of law, a point of law in an academic form, can never be in issue between litigants. The point in issue must necessarily relate to the rights of the parties to the suit, and the determination of those rights may depend upon the determination of facts as

well as on points of law. What the rule of res judicata bars in the re-agitation between the self-same parties or their privies of the self-same issue, which was directly and substantially in issue between them in the previous suit. The right asserted against Dolegobinda in the earlier suits was the right to recover the patni rent deposited by the plaintiffs which saved the patni from sale. That is altogether a different right from the right asserted by the plaintiffs in the present suit, which is a right to recover the darpatni rent deposited by them which saved the darpatni from a rent sale.

In addition to the aforesaid reason, we do not consider these decisions to be res judicata in favour of Dolegobinda. In the suits instituted by Adhar Chandra Mondal, Dolegobinda and the plaintiffs in the suit before us—the Serogis—were defendants. The Serogis were pro forma defendants. No question of res judicata can, therefore, arise so far as they are concerned: 12 Cal. 580.²³ Besides, Dolegobinda and the Serogis were co-defendants and there was no cross-issue between them. The suits by Chatturbhuj and Kishorimull Serogi (Nos. 581 of 1934 and 957 of 1935) against Dolegobinda were instituted in the Court of the Munsif. As the Munsif would have had no jurisdiction to try the suit we have before us on account of his limited pecuniary jurisdiction, the final decision in those suits cannot operate as res judicata.

At the end of the argument, a point was raised that in any event as Joy Chand is the owner of the patni, the suit cannot be decreed in full, but the claim in the suit can succeed only to the extent of one-third of the amount claimed inasmuch as Joy Chand who is also the patnidar claims to have two-thirds share in the money in his right as the sepatnidar. We do not consider this point of any substance.

We accordingly overrule all the above points urged by the respondent. We modify the decree passed by the learned Subordinate Judge. The plaintiffs will have a decree against both Dolegobinda and Nirode Barani for the amount deposited by them in the aforesaid two rent suits less the amount due by them on account of sepatni rent. This amount would carry interest at the rate of four per cent. per annum (simple) from the date of deposits till recovery. The claim as made by the plaintiffs in their plaint is accordingly allowed in part. We allow proportionate costs of both Courts which would bear interest at four per cent. per annum (simple) from this

22. ('28) 15 A. I. R. 1928 Cal. 777 : 115 I. C. 593 : 56 Cal. 723 : 48 C. L. J. 327 : 33 C. W. N. 126 (F.B.), Tarini Charan v. Kedar Nath.

23. ('86) 12 Cal. 580 (F.B.), Brojo Behari v. Kedar Nath.

a date till recovery. No order is necessary on the cross-objection as the subject-matters of the cross-objection have been dealt with in the earlier part of our judgment. We make no order as to costs in the cross-objection.

G.N.

*Decree modified.***A. I. R. (31) 1944 Calcutta 282**

B. K. MUKHERJEA AND BLANK JJ.

*Joy Gopal Singha and others —**Judgment-debtors — Appellants*

v.

*Uday Chand Mahatab Maharajadhiraj*b *Bahadur, Burdwan—Decree-holder — Respondent.*

Appeal No. 28 of 1942, Decided on 1st March 1943, from appellate order of Dist. Judge, Hooghly, D/- 8th December 1941.

(a) Bengal Tenancy Act (8 of 1885), S. 168 — S. 168A is not ultra vires.

Section 168A is not ultra vires of the Legislature : ('42) 29 A. I. R. 1942 Cal. 429 ; ('42) 29 A. I. R. 1942 Cal. 470 and ('42) 29 A. I. R. 1942 Cal. 587, *Rel. on.* [P 282g]

(b) Bengal Tenancy Act (8 of 1885), S. 168A (1), Proviso—Landlord purchasing tenure under Patni Regn., 8 of 1819 — Prima facie there is merger — If tenure be subsequent to Transfer of Property Act, S. 111 (d) of the Act would apply — If prior, principle of S. 111 (d) would apply and intention of parties would be material.

Section 111 (d), T. P. Act, does not in terms apply to a case where the tenancy was created prior to the passing of the T. P. Act but the general law of merger undoubtedly applies. Hence if the two interests are co-extensive and vest in the same person in the same right in execution of a rent decree or in a summary sale under the Patni Regulation, prima facie there would be merger unless it is proved that the intention of the holder was to keep the two interests separate. It would be necessary to consider the conduct of the parties for the purpose of arriving at a decision as to what the intention of the holder really was. [P 283a, b, d]

Hiralal Chakravarti, Surajit Ch. Lahiri for Nripendra Ch. Das — for Appellants.

d *Purusottam Chatterjee — for Respondent.*

Judgment. — This appeal is on behalf of the judgment-debtors and it is directed against an appellate order of Mr. Simpson, District Judge of Hooghly, dated 8th December 1941, reversing a decision of the Subordinate Judge, First Court of that place made in a proceeding under S. 47, Civil P. C. The facts in controversy lie within a short compass and may be stated as follows : The appellants held a patni under the Maharajadhiraj of Burdwan who is respondent before us. The respondent instituted a suit for recovery of arrears of rent due in respect of the patni, being Rent suit No. 2 of 1939, in the Court of the First Subordinate Judge of Hooghly and got a

decree. Before the institution of the suit the patni was sold under Regn. 8 of 1819 and purchased by the Maharajadhiraj himself and the rent suit was for recovery of antecedent balances as well as unrealised portion of the dues for which the patni was sold. The decree-holder got the decree transferred to the Court of the Subordinate Judge at Monghyr for the purpose of proceeding against other immovable properties of the judgment-debtors. Upon this the judgment-debtors presented an application to the Hooghly Court under S. 47, Civil P. C., praying that the certificate might be recalled from the Monghyr Court on the ground that under S. 168A, Ben. Ten. Act, the landlord decree-holder was incapable of proceeding against any other property moveable or immovable of the judgment-debtors. This contention was accepted by the Subordinate Judge who dismissed the decree-holder's application for execution. On appeal the judgment was reversed and it is against this decision of the appellate Court that the present second appeal has been preferred.

The learned District Judge who heard the appeal based his decision on two grounds. In the first place he held that as the patni was sold under Regn. 8 of 1819 prior to the institution of the suit the tenancy had expired so far as the tenant was concerned and consequently the case was governed by the proviso attached to S. 168A (1), Ben. Ten. Act. In the second place it was held by the learned District Judge that S. 168A, Ben. Ten. Act, was ultra vires of the Provincial Legislature and was an invalid piece of legislation.

So far as the second ground is concerned it has now been held by this Court in more cases than one that S. 168A, Ben. Ten. Act, is not ultra vires of the Legislature and that it does not contravene the provisions of any existing Indian law : 46 C. W. N. 540,¹ 46 C. W. N. 628² and 46 C. W. N. 999.³

The District Judge is also not quite correct in saying that it is enough for the purpose of attracting the operation of the proviso to S. 168A (1), Ben. Ten. Act, that the tenure was sold and passed on to a person or persons other than the judgment-debtors at the time when the application for execution was made. What the Legislature contemplates is that

1. ('42) 29 A. I. R. 1942 Cal. 429 : 201 I. C. 24 : 75 C. L. J. 190 : 46 C. W. N. 540, *Satish Chandra v. Sudhir Krishna.*

2. ('42) 29 A. I. R. 1942 Cal. 470 : 202 I. C. 488 : I. L. R. (1942) 2 Cal. 325 : 46 C. W. N. 628, *Satish Chandra v. Bishnu Pada Pal.*

3. ('42) 29 A. I. R. 1942 Cal. 587 : 204 I. C. 168 : 46 C. W. N. 999, *Bir Bikram Kishore v. Tofazzal Hossain.*

a the tenancy itself must be extinguished or came to an end and it is not enough that there was a mere change of hands. In the present case, however, the landlord being himself the purchaser at the patni sale a question of merger would arise and if there was a merger the tenancy must be deemed to be extinguished and the case would come within the purview of the proviso. We agree with Mr. Chakravarti that S. 111 (d), T. P. Act, may not in terms apply to a case where the tenancy was created prior to the passing of the Transfer of Property Act but the general law of merger undoubtedly applies. It is not disputed that in the present case the two interests were co-extensive and vested in the same person in the same right. Prima facie therefore there would be merger unless it is proved that the intention of the holder was to keep the two interests separate. The question however was not approached from this standpoint in any of the Courts below and it would be necessary to consider the conduct of the parties for the purpose of arriving at a decision as to what the intention of the holder really was. We think it proper in these circumstances that the matter should go back in order that this point and this point alone may be investigated. The lower Court will first consider the point as to whether the tenancy was created before or after the passing of the Transfer of Property Act and whether or not the provisions of S. 111 (d) are at all attracted to the facts of the present case. If the provisions of S. 111 (d) apply there would be a merger *ipso jure* and it must be held that as soon as the subordinate and the superior interests were united in the same person there was a coalescence of the two interests and the tenancy right was totally extinguished within the meaning of the proviso to S. 168A (1), Ben. Ten. Act. If, on the other hand, the Court is of opinion that the provisions of S. 111 (d), T. P. Act, do not apply to the facts of this case even then the general principle of merger will apply and the Court will look to the conduct of the parties for the purpose of deciding as to whether in fact the landlord intended to keep the two interests separate. Ordinarily when the landlord purchases a tenancy in execution of a rent decree or in a summary sale under the patni regulation he makes the land khas, that is to say, treats it as belonging to him in proprietary right, but either side may, if he likes, adduce evidence for the purpose of showing what exactly the intention of the landlord purchaser was in the present case.

The result, therefore, is that we allow this

appeal to this extent and send the case back in order that the question of merger may be decided in the light of the observations made above. If the Court finds that there was a merger, the application of the judgment-debtors will be dismissed and the landlord would be at liberty to proceed against other properties of the judgment-debtors. The lower appellate Court can take additional evidence itself or direct the trial Court to do so. We make no order as to costs in this appeal. Leave to appeal to the Federal Court under S. 205, Government of India Act, 1935, is granted.

R.K.

Order accordingly.

A. I. R. (31) 1944 Calcutta 283

LODGE AND DAS JJ.

Nandalal Ghose — Accused — Petitioner
v.

Emperor.

Criminal Revn. No. 293 of 1943, Decided on 30th June 1943.

Penal Code (1860), Ss. 193 and 199—Accused in criminal proceeding swearing false affidavit before Magistrate not having jurisdiction to take evidence—Accused cannot be prosecuted under Ss. 193 and 199.

Where the affidavit by the accused in a criminal proceeding was sworn before a First Class Magistrate who had no jurisdiction to take evidence in the matter in respect of which the accused was prosecuted the provisions of Ss. 4 and 5, Oaths Act, are contravened and the accused therefore cannot be prosecuted under Ss. 193 and 199 for filing a false affidavit on oath. [P 284b, c]

Penal Code —

(40) Ratanlal, Page 504 Pt. 5.

(36) Gour, Page 696, N. 2127; Page 697 N. 2129.

S. C. Talukdar and Mahendra Kumar Ghose
— for Petitioner.

Lodge J.—This rule was issued upon the District Magistrate of Noakhali to show cause why convictions and sentences passed under ss. 193 and 199, Penal Code, should not be set aside. The material facts are as follows: The petitioner was accused of an offence in a complaint made before the Raipur Union Bench. The Bench issued a summons for the appearance of the petitioner. Thereafter the petitioner moved the Sub-divisional Magistrate for a transfer of the case from the file of the Union Bench. A question arose before the Sub-divisional Officer whether the petitioner had or had not appeared before the Union Bench in answer to the summons. A report was received from the Union Bench that the petitioner had not appeared before the Bench either on 8th July or on 12th July 1942. The petitioner stated before the Sub-divisional Officer that he had appeared before the Union

- a Bench on those days. The Sub-divisional Officer thereupon directed the petitioner to file an affidavit to the effect that he had appeared before the Union Bench on those dates. Accordingly an affidavit was sworn before a First Class Magistrate by the petitioner to the effect that he had appeared before the Union Bench on 8th July 1942 and on 12th July 1942. The Sub-divisional Officer made an inquiry and came to the conclusion that the statements in the affidavit filed by the petitioner were false. He accordingly directed the prosecution of the petitioner under ss. 193 and 199, Penal Code. The petitioner was placed on his trial before a Magistrate, First Class, Noakhali, was found guilty and was sentenced under ss. 193 and 193/199, Penal Code, to detention until the rising of the Court and to a fine of Rs. 200, in default of payment of fine he was directed to suffer rigorous imprisonment for six months only. An appeal from the conviction and sentence was dismissed by the Sessions Judge of Noakhali.

In our opinion, this rule must be made absolute. In the first place, the affidavit was sworn before a First Class Magistrate who had no jurisdiction to take evidence in this particular matter. The First Class Magistrate had, therefore, no authority under s. 4, Oaths Act, to administer an oath in the matter. Further, the petitioner was the accused in criminal proceedings which were the subject-matter of the proceedings before the Sub-divisional Officer. Under s. 5, Oaths Act, there is no authority to administer an oath to an accused in a criminal proceeding. For this reason also no oath ought to have been administered to this accused. Such being the case, the petitioner ought not to have been prosecuted for making a false statement on oath and ought not to have been convicted therefor. The rule is accordingly made absolute. The conviction and sentence are set aside and the accused is acquitted. The fine, if paid, will be refunded.

Das, J. — I agree.

G.N.

Rule made absolute.

A. I. R. (31) 1944 Calcutta 284

DERBYSHIRE C. J. AND LODGE J.

Jatindra Gupta and others—Petitioners

v.

Emperor.

Criminal Misc. Case No. 236 of 1943, Decided on 16th February 1944.

(a) Restriction and Detention Ordinance (3 of 1944), S. 6 (2) and proviso — Interpretation and effect of.

The proviso to S. 6 (2) is not repugnant to the provisions of S. 6 (2) itself. Section 6 (2) relates to all orders under the Ordinance whereas the proviso relates to those made under R. 26 (1) (b), Defence of India Rules, namely, detention. Section 6 (2) together with the proviso makes it clear that the detention of persons originally detained under R. 26 (1) (b), Defence of India Rules, is now to be treated as the detention of those persons under Ordinance 3 of 1944, as if an order had been made under that Ordinance on 15th January 1944. [P 285g,h]

(b) Restriction and Detention Ordinance (3 of 1944), S. 10 (2) — S. 10 (2) is valid — S. 10 (2) is not contrary to S. 110, Government of India Act.

Section 10 (2) of the Ordinance is valid and is not beyond the powers of the Governor-General. Even assuming that the cutting down of the powers of the High Court by S. 10 (2) amounts to cutting down of the powers of the Crown in its relation to the administration of justice it cannot be said to affect the sovereignty or dominion or suzerainty of the Crown. Section 10 (2) of the Ordinance, therefore, cannot be said to be contrary to the provisions of S. 110, Government of India Act : ('20) 7 A. I. R. 1920 P. C. 23, *Rel. on.* [P 287b,c,d]

P. K. Bose for N. C. Taluqdar, Arunendra Nath Tagore, Nandlal Roy, Gurudas Bhattacharjee, Nityaranjan Biswas, Sailendranath Chowdhury, Nagendra Mohun Saha and Sanat Kumar Rakshit — for Petitioners.

S. M. Bose, Advocate-General and B. Das—

for the Crown.

Derbyshire C. J.—On 7th September 1943, a Bench of this Court issued a rule under s. 491, Criminal P. C., calling upon the Chief Secretary to the Government of Bengal and the Superintendent of the Dacca Central Jail to show cause why the petitioners, alleged to be illegally and improperly detained in custody, should not be brought up before the Court and dealt with according to law or set at liberty. The number of persons concerned in this rule was 176. The applicants made a joint application for the rule. They were apparently all confined in a jail at Dacca. They are represented before us by Mr. P. K. Bose who agrees that the cases all stand on the same footing. There, however, is one exception, namely, that of petitioner 21, Piyush Kiron Rauth, whose papers have not been available, and his case is not, therefore, taken in the present proceedings. The Advocate-General has appeared on behalf of the Government of Bengal to show cause against the rule. We are informed, and it is not disputed, that with the exception of four persons orders for the detention of the applicants were made by the Governor of Bengal. In the cases of the four others, they were made by the District Magistrate of Chittagong to whom authority to make the orders had been delegated. The orders were originally made under R. 26 (1) (b), Defence of India Rules. Rule 26 was, in April 1943, by the Federal

- a Court, declared ultra vires of S. 2, Defence of India Act. In May 1943, an ordinance was promulgated by the Governor-General validating the orders that had been made under R. 26. The validating of that ordinance was questioned in this Court in May 1943 and in September 1943 by the Federal Court. In the meantime applications had been made by persons including the present applicants, to this Court for orders under S. 491, Criminal P. C. It was as a result of those applications that the rule in question was granted. On 15th January 1944, another ordinance, Ordinance 3 of 1944, was promulgated by the Governor-General which recites :

"Whereas an emergency has arisen which makes it necessary to empower the Central Government and the Provincial Government and any officer or authority to whom the Central Government or the Provincial Government may delegate its powers in this behalf to restrict the movements and actions of and to place in detention and detain certain persons, to regulate the exercise of these powers and the duration of orders made in such exercise, and to confirm the validity of the past exercise of such powers under R. 26, Defence of India Rules;

Now, therefore, in exercise of the powers conferred by S. 72, Government of India Act, as set out in Sch. 9 to the Government of India Act, 1935 (26 Geo. V, c. 2), the Governor-General is pleased to make and promulgate the following Ordinance. . . ."

- c Clause 3 of the Ordinance gives the Central or Provincial Governments power to make orders restricting the movements or actions of or detaining certain persons in certain specified circumstances which are therein set out. There are other provisions in the ordinance, e. g., cl. 4 — as to the photographing, etc., of persons : cl. 5 — as to the delegation of powers and duties of Central and Provincial Governments to other authorities and to officers : cl. 6 — as to the validation of orders made under R. 26, Defence of India Rules : cl. 7 — as to the grounds of order of detention to be disclosed to persons affected by the order : cl. 8 — as to the order of detention made in pursuance of delegation under S. 5 to be reported to Government for confirmation : and cl. 9 — as to the duration of orders of detention made under S. 3. In cl. 10 there are certain saving powers and in cl. 11 the disclosure of the grounds of detention are forbidden. The relevant clauses which arise in this application are first, cl. 6 which provides that :

"(1) No order made before the commencement of this Ordinance under R. 26, Defence of India Rules, shall after such commencement be deemed to be invalid or be called in question on the ground merely that the said rule purported to confer powers in excess of the powers that might at the time the said order was made, be legally conferred by a rule made under S. 2, Defence of India Ordinance, 1939 (5 of

1939) or under S. 2, Defence of India Act, 1939 (35 of 1939).

(2) Every such order shall on the commencement of this Ordinance be deemed to have been, and shall have effect as if it had been, made under this Ordinance, and as if this Ordinance had been in force at the time the order was made :

Provided that Ss. 7 and 9 of this Ordinance shall apply in relation to any order made under cl. (b) of of sub-r. (1) of R. 26, Defence of India Rules, as if that order had been made on the date of the commencement of this Ordinance and S. 8 of this Ordinance shall not apply to any such order"

The next relevant clause is cl. 9 which provides that :

"No order made or deemed under the provisions of S. 6 to have been made under cl. (b) of sub-s. (1) of S. 3 shall be in force for more than six months from the date on which it is made."

Then there is a proviso which is not relevant in the present case. Clause 10 provides that :

"(1) No order made under this Ordinance, and no order having effect by virtue of S. 6 as if it had been made under this Ordinance, shall be called in question in any Court and no Court shall have power to make any order under S. 491, Criminal P. C., 1898 (5 of 1898), in respect of any order made under or having effect under this Ordinance, or in respect of any person the subject of such an order.

(2) If at the commencement of this Ordinance there is pending in any Court any proceeding by which the validity of an order having effect by virtue of S. 6 as if it had been made under this Ordinance is called in question, that proceeding is hereby discharged."

The ordinance in fact sets up a new procedure for dealing with cases of persons who have been detained under the Defence of India Rules. Clause 6 (2) together with the proviso makes it clear that the detention of persons originally detained under R. 26 (1) (b) is now to be treated as the detention of those persons under this ordinance as if an order had been made under this ordinance on 15th January 1944. Mr. P. K. Bose, who is appearing on behalf of the applicants, has argued that the proviso to cl. 6 (2) is repugnant to the provisions of cl. 6 (2) itself. In my view that is not so. Clause 6 (2) relates to all orders under the ordinance whereas the proviso relates to those made under R. 26 (1) (b), namely, detention. In my view the position is as stated above.

It has been contended on behalf of the Government of Bengal that this Court has no jurisdiction to deal with this rule by reason of the provisions of cl. 10. Mr. P. K. Bose on the other hand, has contended that the provisions of cl. 10 which in effect oust the jurisdiction of the Court to deal with this matter are themselves invalid as being beyond the powers of the Governor-General. If cl. 10 (2) is valid then there is an end of these proceedings because they have under the ordinance been discharged, that is, put an

a end to, as from 15th January 1944, and we have no further powers to deal with them.

Mr. P. K. Bose for the applicants has further contended that the Governor-General in ousting the jurisdiction of the Courts has acted contrary to the provisions of S. 110, Government of India Act, 1935, which provides that:

"Nothing in this Act shall be taken—

* * * * *

(b) to empower the Federal Legislature, or any Provincial Legislature—

(i) to make any law affecting the Sovereign or the Royal Family, or the Succession to the Crown, or the sovereignty, or dominion or suzerainty of the Crown in any part of India."

b It is necessary therefore to see what the Governor-General's powers with regard to this class of legislation are. Under S. 317, Government of India Act, 1935, the provisions of the Government of India Act, 1915, as set out in Sch. 9 of the Act shall continue to have effect. In Sch. 9, Government of India Act, 1935, is set out S. 72, Government of India Act, 1915, which provides that:

c "The Governor-General may, in cases of emergency, make and promulgate ordinances for the peace and good government of British India or any part thereof, and any ordinance so made shall, for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Indian Legislature; but the power of making ordinances under this section is subject to the like restrictions as the power of the Indian Legislature to make laws."

On 3rd September 1939, when war was declared an emergency was proclaimed. Thereafter under S. 102, Government of India Act, 1935, the Federal Legislature was given power to make laws for the province in respect to any of the matters enumerated in the Provincial List. So that it follows that from 3rd September 1939, the Governor-General could pass such laws as the Central Legislature and the Provincial Legislature could pass for the peace and good government of British India.

d Section 100, Government of India Act, 1935, prescribes what laws the Central Government may make and what laws the Provincial Government may make by reference to Sch. 7 of the Act. Schedule 7, the Federal, that is, the Central Legislative List in Item 1, gives power to the Central Legislature to make laws with regard to preventive detention in British India for reasons of State connected with defence, external affairs, or the discharge of the functions of the Crown in its relation with Indian States. Under List 2 as set out in Item 1 the Provincial Government may make laws amongst other things relating to public order, the administration of justice, the constitution and organization of all Courts, except the Federal Court, preventive deten-

tion for reasons connected with the maintenance of public order and persons subject to such detention. Under Item 2 of List 2 the Provincial Government may make laws with regard to jurisdiction and powers of all Courts except the Federal Court with respect to any of the matters in this List. List 3 is a Concurrent List and contains subjects upon which both the Central and Provincial Legislatures may make laws. Items 1 and 2 contain criminal law and criminal procedure.

It is clear, therefore, that from and after 3rd September 1939, the Governor-General had powers to make laws under the provisions of S. 72, Government of India Act, 1915 and S. 102, Government of India Act, 1935 and the Legislative List of Sch. 7 in relation to preventive detention and the jurisdiction and powers of the High Courts. The High Courts' jurisdiction and powers are confirmed by S. 223, Government of India Act, 1935, which continues the jurisdiction as follows:

"Subject to the provisions of this part of this Act, to the provisions of any Order in Council made under this or any other Act and to the provisions of any Act of the appropriate Legislature enacted by virtue of powers conferred on that Legislature by this Act the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in Court, shall be the same as immediately before the commencement of Part III of this Act."

Section 311, Government of India Act, 1935, namely, the interpretation section, provides in sub-s. (6) that :

"Any reference in this Act to Federal Acts or laws or Provincial Acts or laws, or to Acts or laws of the Federal or a Provincial Legislature, shall be construed as including a reference to an ordinance made by the Governor-General or a Governor-General's Act or, as the case may be, to an ordinance made by a Governor or a Governor's Act."

The powers of the High Courts were given to them by S. 9, High Courts Act of 1861 in Letters Patent granted in 1865. Clause 9, High Courts Act, sets out the jurisdiction of the High Courts hitherto exercised and states that they shall have jurisdiction in such matters as Her Majesty may by Letters Patent grant and direct subject, however, and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council. The High Courts Act, 1861, was repealed by the Government of India Act, 1915, which however by S. 106 continued the existing jurisdiction of the High Courts. Clause 44 of the Letters Patent provides :

"And we do further ordain and declare, that all the provisions of these our Letters Patent are subject to the legislative powers of the Governor-General

a in Legislative Council and also of the Governor-General in Council under S. 71, Government of India Act, 1915, and also of the Governor-General in cases of emergency under S. 72 of that Act, and may be in all respects amended and altered thereby."

It is clear, therefore, that the powers of the High Court are subject to the legislative powers of the Governor-General in cases of emergency under S. 72 of the Act of 1915 and may be in all respects amended and altered thereby. The Governor-General since 3rd September 1939, has had power to deal legislatively with the powers and jurisdiction of the High Courts and with matters of preventive detention. Clause 10 of the Ordinance in question deals with the powers of the High Courts and their jurisdiction to deal with cases of preventive detention. Clause 10 of the Ordinance cuts down the powers of the High Court to deal with cases of this kind. However, it is said by Mr. P. K. Bose, "Yes but in cutting down the powers of the High Court to deal with matters of this sort the Governor-General is doing something which he is not permitted to do under S. 110, Government of India Act, namely, making laws affecting the sovereignty, or dominion or suzerainty of the Crown in any part of India."

c It is said that cutting down the powers of the High Court is cutting down the powers of the Crown in its relation to the administration of justice. Assuming that that is correct I am unable to see how the sovereignty, or dominion or suzerainty of the Crown is affected. Such a contention was negatived by the Privy Council in 47 I. A. 128¹ at pp. 137 and 138 where the question was whether Ordinance 4 of 1919 was invalid under S. 65 (2) and S. 72, Government of India Act, 1915, which prevented the Governor-General from making any law "affecting the sovereignty or dominion of the Crown over any part of British India." In my opinion for the above reasons, the contention that clause 10 (2) of Ordinance 3 of 1944 is invalid fails. That being so, the effect of cl. 10 (2) is that the rule which has been granted and the proceedings thereunder in these matters were deemed to be discharged on 15th January 1944. The result is that we have no further powers to deal with these applications. For that reason we formally make the order that this rule is discharged. Certificate under S. 205, Government of India Act, is granted in this case.

Lodge J.—I agree.

G.N.

Rule discharged.

1. ('20) 7 A. I. R. 1920 P. C. 23 : 56 I. C. 440 : 21 Cr. L. J. 456 : 1 Lah. 326 : 47 I. A. 128 (P.C.), Bugga v. Emperor.

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HENDERSON J.

Sri Sri Raj Rajeswar Tahkur represented by managing shebait and next friend Nrishinha Charan Nandi Choudhuri and another — Petitioners

v.

*Lakshmi Kanta Pramanik and others—
Opposite Party.*

Civil Rule No. 1326 of 1942, Decided on 10th January 1944, issued from order of 2nd Court of Addl. Sub-Judge, 24-Parganas at Alipore, D/- 14th May 1942.

Bengal Tenancy Act (8 of 1885), S. 88 (2), provisos (b) and (c)—Interpretation of proviso (c)—Application under S. 88 by one of tenants A for division of original rent of Rs. 12-14-11 gandas—Order holding share due from A to be Rs. 12-1-0 held did not contravene S. 88 (2), proviso (b) even though B's share reduced to 14 annas 11 gandas.

The original rent payable by tenants A and B was Rs. 12-15-11 gandas. On the application of A under S. 88 for division of the rent, the Court passed an order that the share of the rent due from A was Rs. 12-1-0. It was contended that the order offended against proviso (b) to S. 88 (2) as the balance of rent due from B was reduced to 14 annas 11 gandas:

Held that S. 88 (2) proviso (c) did not lay down that a tenant who did not join in the application for division of rent would not be debarred from re-agitating the matter in some subsequent proceeding. It went much farther than that and prohibited a Court from making an order at all with respect to the share of such a tenant. As the Court was prohibited by S. 88 (2), proviso (c), from making any order for distribution with respect to the share of B the order which it had actually made did not contravene the provisions of S. 88 (2), proviso (b). [P 288b,c]

Surajit Chandra Lahiri — for Petitioner.

Rama Prosad Mukherjee, Jajneswar Majumdar and Uma Prosad Mukherjee —

for Opposite Party.

Order.—This rule has been issued in connexion with a proceeding under S. 88, Ben. Ten. Act. I have already dealt with the question common to this and the connected rules in my previous judgment delivered in Civil Revn. Case No. 1294 of 1942. There is, however, one special point in the present case which requires consideration. The original rent was Rs. 12-15-11 gandas. The case of the principal opposite parties (Nos. 1 to 5) was that the share due from them would amount to Rs. 12-1-0. If this division is correct, the balance due from the pro forma opposite parties 6 to 8 would be 14 annas 11 gandas. Mr. Lahiri's contention is that this offends against proviso (b) to sub. (2). The Munsif made an order in favour of opposite parties 1 to 5 in the terms of their prayer. He did not make any order with regard to pro forma opposite parties 6 to 8. The petitioner could, therefore, only succeed in revision by showing that it follows by neces-

a sary implication that the separate liability for the rent of opposite parties 6 to 8 is reduced to 14 annas 11 gandas. The question involves the consideration of proviso (c) which is in these terms :

"Nothing contained in this sub-section shall be deemed to authorise a Court on an application for division or distribution to direct a division or distribution in respect of the share of any tenant other than an applicant under this sub-section or a co-sharer tenant who has been joined as a co-applicant under sub-s. (3)."

Mr. Lahiri argued that this merely means that the question will not be *res judicata* so far as a tenant within the terms of the proviso is concerned. In my judgment it is impossible to reconcile any such interpretation with the language actually used. The proviso does not lay down that a tenant who does not join in the application will not be debarred from re-agitating the matter in some subsequent proceeding. It goes much farther than that. It prohibits a Court from making an order at all with respect to the share of such a tenant. Difficult question will certainly arise with regard to the legal effect of orders such as that made in the present case. But their solution is beyond the scope of the present rule. Nor is it possible to ascertain the reasons which led to the insertion of this proviso. It may, however, be that the Legislature thought it undesirable that the parties should be compelled to fight out in a summary proceeding a dispute which ultimately raises a question of title. The result is that the Munsif is prohibited by proviso (c) from making any order for distribution with respect to the shares of opposite parties 6 to 8. Hence the order which he has actually made does not contravene the provisions of proviso (b). The rule is discharged. I make no order as to costs.

G.N.

Rule discharged.

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HENDERSON J.

Sm. Meherunnisa Bibi — Appellant

v.

Satish Chandra Dutta — Respondent.

Appeal No. 150 of 1942, Decided on 21st June 1943, from appellate order of Addl. Dist. Judge, Midnapore, D/- 23rd February 1942.

(a) Bengal Money-lenders Act (10 of 1940), S. 38—Application by mortgagor under—Scope of relief to be granted.

The Court has no jurisdiction under S. 38 to find that anything is due from the mortgagee to the mortgagor. The most that the mortgagor can ask for under S. 38 is a declaration that nothing is due on the mortgage. [P 288h; P 289a]

(b) Bengal Money-lenders Act (10 of 1940), Ss. 30 (1) (c) and 2 (8).—Usufructuary mortgage — Mortgagor is entitled to relief under S. 30 (1) (c)—Court can take account and limit rate of interest to that allowed by S. 30 (1) (c).

The usufruct of the mortgaged property which a usufructuary mortgagee is entitled to appropriate in lieu of interest is interest within the meaning of S. 2 (8) and therefore the mortgagor is entitled to claim relief under S. 30 (1) (c) and the Court can take an account and limit the rate of interest to that allowed by S. 30 (1) (c) notwithstanding that the mortgagee under S. 77, T. P. Act, is not liable to account. [P 289b,e,f]

(c) Bengal Money-lenders Act (10 of 1940), S. 38—Deposit by mortgagor under S. 83, T. P. Act refused by mortgagee — Mortgagor is not estopped from applying for relief under S. 38.

As long as his equity of redemption remains intact the mortgagor cannot be prevented from taking advantage of the Act. Consequently where the deposit under S. 83, T. P. Act, by the mortgagor of the amount due on the mortgage was refused by the mortgagee, the mortgagor is not estopped from applying under S. 38, Bengal Money-lenders Act, merely by reason of his deposit under S. 83, T. P. Act. [P 289b,c]

Manindra Krishna Ghose — for Appellant.

Gopendra Nath Das and Sambhunath Banerjee (Sr.) — for Respondent.

Judgment. — This appeal is by the mortgagee and it arises in connexion with an application made by the respondent under the provisions of S. 38, Bengal Money-lenders Act. Exhibit 1 is a copy of the usufructuary mortgage bond executed by the respondent in favour of the appellant. Under its terms the appellant was to remain in possession of the mortgaged property in lieu of interest. The principal sum advanced was Rs. 440. The respondent paid this sum into Court under the provisions of S. 83, T. P. Act. The appellant refused to take it on the ground that the deposit was insufficient. It cannot be ascertained with precision from the materials on the record on what basis this objection was sought to be sustained. It seems, however, that the appellant was relying upon Ex. 3 a later mortgage, which according to the respondent was never acted upon. At any rate, it is the validity of this document which is the chief point of dispute between the parties. A few months after the deposit under S. 83, T. P. Act, became infructuous, the Bengal Money-lenders Act came into force. The respondent then filed the present application with, for him, the delightful result that he has obtained a declaration that, instead of being indebted to the appellant, he is entitled to recover Rs. 83 from her. An appeal by the appellant to the District Judge was dismissed

Mr. Ghose has objected to the form of the order and contends that the Court has no

a jurisdiction under this section to find that anything is due from the mortgagee to the mortgagor. Mr. Das conceded that this contention is correct, and admitted that the most he could ask for is a declaration that nothing is due on the mortgage.

On the merits, Mr. Ghose contended that S. 38 has no application in view of the terms of the bond. The mortgagee was put into possession in lieu of interest. Under S. 77, T. P. Act, he was absolved from accounting. As a result, no question of accounting can arise. The question depends upon the provisions of S. 30, Bengal Money-lenders Act. b Under sub-s. 1 (c) interest is not to exceed 8 per cent. per annum. This applies even when the loan was advanced and interest was paid before the commencement of the Act. The result is that the respondent is entitled to the benefit of this provision in spite of the terms of the original bond. The Munsif was, therefore, right to take an account and limit the rate of interest to that allowed by the section.

In the second place it was contended that the respondent is estopped from making this application in view of his deposit under S. 83, T. P. Act. There is nothing in this connexion upon which any plea of estoppel can be based. c The deposit merely amounted to an offer which the appellant refused. As long as his equity of redemption remains intact, the respondent cannot be prevented from taking advantage of an Act passed to give relief to debtors.

It remains to consider one curious argument on behalf of the appellant to the effect that the Munsif was wrong in allowing interest at 8 per cent., when the bond itself does not provide for any particular rate. When I asked Mr. Ghose what rate should be allowed in view of the provisions of the bond, d he was of course unable to give any answer. If anything turns upon the provisions of the bond in this respect, the only conclusion would be that the appellant is not entitled to any interest at all. The Munsif was obviously right when he calculated the interest at the highest rate allowed by the law.

Objection was also taken to some of the findings on the report of the commissioner who took the accounts. These are dealt with under the headings 3, 4 and 5 in the final judgment of the Munsif. The sums under the first two heads are so small that they do not affect the result. I only deal with them because of the principle involved. They consist of money which the appellant might have realised from the tenants but actually did not.

Under the terms of the bond, the appellant e was not liable to account; the profits were at his absolute disposal and he was entitled to make remissions. It may seem a hardship that as a result of a change in the law he should now be called upon to account for them. That, however, will not entitle a Court to refuse to give effect to the law and it is a matter of experience that usufructuary mortgages are generally highly paying propositions for the mortgagee. The question depends upon whether these sums are interest within the meaning of S. 2 (8). It is therein provided that interest includes any sum by whatever name it is called in excess of the principal paid or f payable to a lender in consideration of a loan. It is, therefore, necessary to see whether these sums were payable to the appellant in consideration of the loan. It is not disputed that they were in excess of the principal paid. By the terms of the agreement the appellant was put into possession of the property in lieu of interest. As a result the tenants were liable to pay this rent to the appellant. It was, therefore, payable to the lender in consideration of the loan.

The last item refers to sums covered by rent decrees actually obtained by the appellant. In view of what has been said above, it g would be impossible to hold that they are not interest within the meaning of the section. The result is that the order of the Munsif is modified. There will be a declaration that nothing is due from the respondent to the appellant on the mortgage bond of which Ex. 1 is a copy. The order made by the Munsif for costs is in every respect reasonable. I therefore direct both parties to bear their own costs throughout.

G.N.

Order modified.

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B. K. MUKHERJEA AND SHARPE JJ. h
Bhupendra Nath Chatterjee and others
— Defendants — Appellants

v.

Sm. Trinayani Devi — Plaintiff — Respondent.

Appeal No. 855 of 1940, Decided on 16th February 1944, from appellate decree of Dist. Judge, Howrah, D/- 6th March 1940.

(a) Tort — Malicious proceedings in civil Court—Action for damages when maintainable under English law — Malicious arrest or abuse of execution proceedings and false imprisonment or unlawful seizure or attachment of plaintiff's property — Action for damages for—Distinction — Essentials to be proved indicated —Proof of want of reasonable or probable cause if necessary.

^a According to the law of England, it is an actionable wrong to set in motion the machinery of a criminal Court against a person maliciously and without reasonable and probable cause. No action, however, lies for instituting civil proceedings falsely and maliciously, as the ordinary presumption is that a successful defendant, who is unsuccessfully sued, is amply compensated by the order for costs in his favour. Exceptions are, however, made in certain specific cases where as a consequence of the legal proceedings, some damage results, of which the law will take notice; e. g., when a man's liberty is taken away or his fair name and credit are injured: (1883) 11 Q.B.D. 674, *Rel. on.* [P 291e,f]

A distinction has all along been made between malicious arrest or abuse of execution proceedings on the one hand and false imprisonment or unlawful seizure or attachment of the plaintiff's property on the other. In the first case, the defendant acts under order or authority of the Court, and the foundation of the action is the malicious procuring of the order of the Court by representation of facts which the defendant knew to be false or of which there was no reasonable and proper basis. In the other class of cases, the act is an act of the defendant himself or of a ministerial officer of the Court and even if there is an order of the Court behind it, it is void for want of jurisdiction. In such a case if there is a restraint imposed on the liberty of the plaintiff, or if there is wrongful entry upon his property, the defendant is liable on an action of trespass and neither malice nor want of reasonable and probable cause need be established. The position, therefore, is that if a litigant takes out any form of legal process which is void for want of jurisdiction and in so doing commits an act in the nature of trespass he will be liable in an action of trespass and no question of malice or want of reasonable and probable cause would arise; but if there was a valid or subsisting order of the Court at the time when the processes are taken out, the action would be one on the case and it would be necessary to prove malice before the plaintiff could recover damages: (1910) 2 K. B. 244, *Rel. on.* [P 291g,h; P 292d]

(b) Tort—Malicious proceedings — A obtaining injunction against B — Suit by B against A for damages — Proof of want of reasonable and probable cause if necessary — Suit if may be treated as one for trespass — Effect of S. 95, Civil P. C.

^d When a party aggrieved by an injunction obtained against him by another, brings a suit for damages against the latter the essence of the action is the malicious abuse of the processes of the Court and therefore it is not enough for the plaintiff to show that the injunction was obtained on insufficient grounds as demonstrated by the subsequent result of the suit. He must go further and prove that there was no reasonable and probable cause upon which the application for injunction could be founded and that the defendant was actuated by malice: 16 I. C. 443 (Cal.), *Dissent.*; *Case law discussed.* [P 292g,h]

The position would be different if the order of the Court granting the injunction was void for want of jurisdiction or the act of obtaining the injunction could be regarded as the act of the defendant himself or of a ministerial officer of the Court. In such circumstances if there was actual interference with the property of the plaintiff, an action of trespass would undoubtedly lie. But when none of the circumstances mentioned above exists, it is incumbent upon the plaintiff to prove malice and want of reasonable or probable cause before he could be given damages against the defendant. [P 293a]

Section 95, Civil P. C., does not in any way interfere with the principles regulating suits for damages for abuse of the processes of the Court. That section allows a limited remedy without proof of malice which is open to a party to avail himself of if he chooses, but if he is not satisfied with that summary remedy and files a suit for compensation in the regular way, he must prove the essential ingredients of a malicious abuse of the Court's processes: 35 Mad. 598, *Rel. on.* [P 296e,f]

C. P. C. —

('44) Chitale, S. 95 N. 13.

('41) Mulla, Page 350, Note "This section . . . suit."

Panchanon Ghose and Jagadish Ch. Ghose —
for Appellants.

Gopendra Nath Das and Sambhunath Banerji
(Sr.) — for Respondent.

B. K. Mukherjea J. — This appeal is on behalf of the defendants and it arises out of a suit commenced by the plaintiff for recovery of damages on the allegation that the defendants brought a false and malicious suit against the plaintiff and obtained an improper order of injunction in the same, which resulted in loss to her. The plaintiff is admittedly a tenant under the defendants in respect of a small plot of land measuring about one and a half cottas and situated at Bally in the district of Howrah. She purchased this tenancy right from one Elokeshi Dasi who held this one and a half cotta plot along with other lands as a tenant under the defendants. There were litigations between the defendants on the one hand and Elokeshi Dasi and a subtenant of hers named Nagendra Ganguly, on the other, ever since 1913. The plaintiff's purchase is dated 20th February 1934, after her purchase she applied to the Chairman, Bally Municipality, for sanction to construct a masonry building on the purchased plot. This sanction was granted and thereupon, it is said, the plaintiff, with a view to construct the building collected the necessary materials on the plot. In the meantime, the defendants instituted a suit being T. S. No. 749 of 1934, against the plaintiff in the Court of the third Munsif at Howrah for a declaration that she had no right to erect any permanent structure on the land and for a perpetual injunction restraining her from proceeding with the work of construction. Pending the hearing of the suit they obtained a temporary injunction against her on 7th September 1934, by which she was restrained from raising any structure on the disputed property. On 30th August 1935 the suit was dismissed. Against this decree of dismissal the defendants took an appeal to the Court of the District Judge at Howrah and soon after the filing of the appeal got an ad interim injunction against the plaintiff which was made absolute on 11th November 1935, subject to this modifica-

a tion that the plaintiff was allowed to raise only a tin structure on bamboo posts. The appeal was eventually dismissed on 28th February 1936, and a second appeal preferred to this Court was also dismissed on 17th December 1937.

The plaintiff brought this present suit on 4th August 1938, claiming damages against the defendants for the loss occasioned to her by the temporary injunction granted in the suit and also in the appeal. The suit was valued at Rs. 710 out of which Rs. 350 was claimed as rent for 14 months, from September 1934 to October 1935, and Rs. 260 was the b rent claimed for the subsequent period during which the modified order of injunction was in force. The defendants in resisting the plaintiff's claim for damages, contended inter alia that the suit was barred by limitation, that in instituting T. S. No. 749 of 1934, they were not actuated by malice and that there were reasonable and proper grounds upon which the order of injunction was made by the Court after hearing both sides. They also averred that the claim for damages was excessive.

The trial Court decided the suit in favour of the plaintiff and gave her a part decree c allowing Rs. 220 as damages with proportionate costs. This judgment was affirmed on appeal by the District Judge of Howrah. It is against this decision that this present second appeal has been preferred. Both the Courts below have taken the view that in order to enable the plaintiff to succeed in this suit it was not necessary for her to show malice or want of reasonable or probable cause on the part of the defendants, and as the plaintiff was deprived of the enjoyment of her property by reason of the temporary injunction which, as the result of the suit showed, was obtained improperly, she was entitled to com- d pensation from the defendants. Mr. Ghose appearing in support of the appeal has challenged this view as erroneous and unsound and he has contended before us that as the Courts below did not find on evidence that the appellants were actuated by malice and had no reasonable or probable cause for instituting the proceedings, no decree could have been given in favour of the plaintiff. Mr. Das appearing on behalf of the plaintiff-respondent has argued on the other hand, that the act of the defendants in wrongfully interfering with the property rights of the plaintiff amounted to trespass in law and they were answerable in damages to the plaintiff for any loss sustained by her, irrespective of the fact as to whether they had any improper

motive or acted without reasonable or probable cause. A large number of decisions have been cited to us by the learned advocates in support of their respective contentions. The question is one of importance and requires careful consideration.

Now, according to the law of England, it is an actionable wrong to set in motion the machinery of a criminal Court against a person maliciously and without reasonable and probable cause. No action, however, lies for instituting civil proceedings falsely and maliciously, as the ordinary presumption is that a successful defendant, who is unsuccessfully sued, is amply compensated by the order for costs in his favour. Exceptions are, however, f made in certain specific cases where, as a consequence of the legal proceedings, some damage results, of which the law will take notice; e. g., when a man's liberty is taken away or his fair name and credit are injured: *vide* (1883) 11 Q.B.D. 674.¹ Thus it is actionable wrong to present a bankruptcy petition against a person or start liquidation proceedings against a company maliciously and without reasonable or probable cause. So also it is an actionable injury to procure the arrest and imprisonment of the plaintiff, or to cause an execution to be levied in respect of his pro- g perty, by means of any legal process which is inspired by malice and destitute of any reasonable and probable cause: *vide* Salmond on Tort, 9th Edn., page 655. A distinction has all along been made between malicious arrest or abuse of execution proceedings on the one hand and false imprisonment or unlawful seizure or attachment of the plaintiff's property on the other. In the first case the defendant acts under order or authority of the Court, and the foundation of the action is the malicious procuring of the order of the Court by representation of facts which the defendant knew to be false or of which there was h no reasonable and proper basis. In the other class of case, the act is an act of the defendant himself or of a ministerial officer of the Court and even if there is an order of the Court behind it, it is void for want of jurisdiction. In such a case if there is a restraint imposed on the liberty of the plaintiff, or if there is wrongful entry upon his property, the defendant is liable on an action of trespass and neither malice nor want of reasonable and probable cause need be established.

Reference may be made in this connexion to the pronouncement of the Court of Appeal

1. (1883) 11 Q. B. D. 674 : 52 L. J. Q. B. 488 : 49 L. T. 249 : 31 W. R. 668, *Quartzhill Gold Mining Company v. Eyre*.

^a in England in (1910) 2 K. B. 244.² In this case a solicitor had taken out a writ of *fi. fa.* upon an order for costs made in favour of his client, against the plaintiff, in the High Court. The debt was in fact paid at the county office of the solicitor on the very same day and about three hours before the writ of execution was sued out. The money was received by the clerk and the solicitor himself was not aware of it. Execution being levied on the plaintiff's goods, the solicitor was informed that the debt had been already paid and he withdrew the execution. The plaintiff thereupon brought an action against the solicitor and his client for improperly levying execution and, in the alternative, for trespass. The County Court gave the plaintiff £15 as damages. On appeal the Divisional Court dismissed the action being of opinion that the defendants were not liable for trespass nor in the absence of malice, they could be made liable in an action on the case. The matter then came up before the Appeal Court at the instance of the plaintiff, and the Appeal Court decided in favour of the plaintiff and held that the defendants were liable for trespass. Vaughan Williams L. J. in course of his judgment pointed out the distinction between

^c an action on the case based on an abuse of the process of the Court, and an action of trespass. In the former it was essential to prove malice and without it the action could not be supported. In the latter case it was not necessary to establish malice. There could not be any trespass if the seizure of plaintiff's goods was made under a writ of execution which was valid and binding at the date when the processes were taken out. But if the judgment was already satisfied there could be no basis for the writ and an entry upon plaintiff's premises upon a writ which was void ab initio would amount to trespass and be actionable per se without proof of malice or

^d want of reasonable and probable cause.

The position, therefore, is that if a litigant takes out any form of legal process which is void for want of jurisdiction and in so doing commits an act in the nature of trespass he will be liable in an action of trespass and no question of malice or want of reasonable and probable cause would arise; but if there was a valid or subsisting order of the Court at the time when the processes are taken out, the action would be one on the case and it would be necessary to prove malice before the plaintiff could recover damages. In England a suit

for damages on the ground that the defendant got an injunction wrongfully against the plaintiff is very rare; it being the normal practice for Courts to insist on an undertaking in damages by the party in whose favour the injunction is granted. It is clear however from the principles indicated above that to sustain an action for damages on the ground of an improper injunction being taken out against the plaintiffs it would be necessary to prove the usual ingredients of malicious abuse of judicial processes; and no action for trespass could lie unless the order was void for want of jurisdiction and there was actual entry upon, or wrongful interference with, the plaintiff's property.

In India the Courts in the mufassil are not generally in the habit of taking an undertaking in damages at the time of granting an injunction and proceedings on such undertaking are extremely rare except in the Presidency towns. The Indian law gives a summary remedy to a party who has sustained loss by reason of an improper order of injunction being issued against him, and s. 95, Civil P. C., provides inter alia that the defendant against whom an injunction was granted may apply to the Court which passed the order, and if the Court is satisfied that the injunction was applied for on insufficient grounds or that there was no reasonable and probable cause for instituting the suit which was decided in his favour, it may award against the plaintiff such amount not exceeding one thousand rupees as it deems proper as reasonable compensation to the defendant for the expense or injury caused to him. This remedy is entirely discretionary, and the defendant, if he so chooses, may not avail of it and may file a regular suit for compensation. The question is, whether in a case like the one before us, when a party aggrieved by an injunction obtained against him by another, brings a suit for damages against the latter is it enough for him to show that the injunction was obtained on insufficient grounds as is demonstrated by the subsequent result of the suit; or is it necessary, as Mr. Ghose contends, that he should go further and prove that there was no reasonable and probable cause upon which the application for injunction could be founded and that the defendant was actuated by malice?

In our opinion, the contention of Mr. Ghose is correct and as the essence of such action is the malicious abuse of the processes of the Court it is not sufficient to show that the injunction was obtained on insufficient grounds; it must be proved also that the defendant

2. (1910) 2 K. B. 244 : 79 L.J.K.B. 635 : 102 L. T. 520 : 54 S. J. 442 : 26 T. L. R. 409, *Clissold v. Cratchley*.

a knew them to be insufficient and acted from an improper motive. The position would be different indeed if the order of the Court was void for want of jurisdiction or the act could be regarded as the act of the defendant himself or of a ministerial officer of the Court. In such circumstances if there was actual interference with the property of the plaintiff an action of trespass would undoubtedly lie. But as none of the circumstances mentioned above exists in the present case it was incumbent in our opinion upon the plaintiff to prove malice and want of reasonable or probable cause before she could be given damages against the defendants. This view which is based upon the principles of English law referred to above is fully borne out by a large number of decisions of this as well as of other High Courts in India. There are one or two decisions, however, which have been referred to in the judgment of the Court of appeal below where a different opinion has been expressed by certain eminent Judges of this Court. It is necessary therefore that we should examine the relevant decisions on this point closely and carefully.

One of the earliest pronouncements of this Court on the subject is to be found in 9 W. R. c 133.³ In this case the defendant got a decree against one Ameer Biswas and in execution of the same prayed for attachment of a decree which Biswas got against one Mr. White. The Sadar Amin, purporting to act under S. 92 of Act 8 of 1859, granted an injunction restraining Biswas from selling his decree and also ordered White not to make any payment to Biswas. This order was made on 7th July 1865. About ten days before that, Biswas had sold his decree to the plaintiff. On 18th August 1865 the Principal Sadar Amin held that the defendant was barred by limitation from executing the decree against Ameer Biswas and d released the decree from attachment. Against this decision there was an appeal to the District Judge and pending the hearing of the appeal the decree was re-attached under orders of the appellate Court dated 21st September 1865. The plaintiff in the meantime prayed for execution of the decree as an assignee of Ameer Biswas. This application was refused on the ground that the decree was already under attachment under orders of the District Judge. The appeal was eventually dismissed and the order was affirmed on second appeal to this Court in February 1867. All this time, however, the decree remained under attachment at the instance of the defendant and the plaintiff

could not execute it. At the time when the second appeal was dismissed White had become insolvent and the plaintiff lost all the benefits of the decree. The plaintiff thereupon brought a suit for damages against the defendant, for loss sustained by him, in the Small Cause Court and on a reference being made to this Court by the Small Cause Court Judge it was held by Peacock C. J. and Hobhouse J. that the plaintiff's suit should fail as the defendants had not acted maliciously and without reasonable and probable cause and what was done was done under orders of a competent Court. "If a plaintiff brings a suit," so runs the judgment,

f "or makes an application maliciously or without probable and reasonable cause to a Court of competent jurisdiction, to seize property of another person as the property of his judgment-debtor, he may be liable for damages for any injury which may be occasioned by reason of the order of the Court. Upon the same principle a person may be liable to damages for applying for an injunction upon grounds which he knows to be insufficient; but in this case the defendants were not acting maliciously or without probable cause but merely applied for the attachment of the decree which had been obtained by his own judgment-debtor when there was nothing to show that the decree had been sold to the plaintiff."

In 11 W. R. 143⁴ the plaintiff sued the defendant for damages on the ground of an injunction being issued against him at the g instance of the latter by which he was restrained from sowing indigo crops on his land. It was held by this Court that the suit was not barred by S. 96 of the old Civil P. C., which corresponds to S. 95 of the present Code, and as the evidence showed that the defendant acted without reasonable and probable cause the plaintiff had a good cause of action. The suit was dismissed, however, on the ground that the plaintiff failed to prove the special damage which was the gist of his case. The case in 4 Cal. 583⁵ next demands our attention. This case arose out of a suit commenced by the plaintiff for recovery of h damages on the ground of wrongful and malicious arrest. It was held by the Court that such a suit would lie but the plaintiff, in order to succeed, must show, firstly, that the original civil action out of which the alleged injury arose was decided in favour of the plaintiff; secondly, that the defendant maliciously and without reasonable and probable cause procured the arrest of the plaintiff and thirdly, that the injury or damage which the plaintiff sustained was something other than that which might have been compensated for by an award of the costs of the

3. ('68) 9 W. R. 133, *Joykali Dassi v. Representative of Chandmalla*.

4. ('69) 11 W. R. 143, *E. Wilson v. Kanhya Sahu*.

5. ('79) 4 Cal. 583, *Raj Chandra Roy v. Shama Sundari*.

a suit and that he in fact suffered "some collateral wrong."

We would now turn to the decision in 16 C. L. J. 34⁶ upon which much stress is laid by the respondent. This appeal arose out of a suit commenced by the plaintiff-appellant for recovery of damages on the ground of an injunction being obtained against him by the defendant in a previous suit which had the effect of restraining him from proceeding with the construction of a building. The suit was dismissed by the Courts below on the ground inter alia that the plaintiff had no cause of action. On appeal to this Court the decision was reversed and the suit was decreed. Sir Asutosh Mookerjee J. in delivering the judgment observed as follows:

"Upon the merits the plaintiff is clearly entitled to succeed. The dismissal of the previous suit shows that the injunction was improperly obtained; in other words, the defendants have unlawfully interfered with the exercise of property rights of the plaintiff. The defendants have thus committed an act in the nature of trespass to property, (1910) 2 K. B. 244,² and are consequently liable in an action for trespass; it is not necessary for the plaintiff to prove any malice or want of reasonable and probable cause."

With all deference to the learned Judge, we are bound to say that the decision goes against well-established principles laid down by English and Indian Judges upon which he purported to rely. In (1910) 2 K. B. 244,² as we have already pointed out, the judgment upon which the writ was issued was satisfied and was of no effect on the date when execution was taken out. Moreover, in that case there was actual seizure of the plaintiff's goods which is essential in an action of trespass. In 16 C. L. J. 34⁶ the injunction order might have been improper, as the subsequent result of the litigation showed, but it was not a void order and there was no actual entry upon, or interference with the plaintiff's property. On no conceivable principle, therefore, the taking out of the injunction itself could amount to trespass in law. It could only come under the category of malicious abuse of the Court's process and it was incumbent upon the plaintiff to prove that the defendant acted maliciously and without reasonable and probable cause.

The next case in point of time is that in 42 Cal. 550.⁷ There the defendant had brought a suit for a perpetual injunction against the plaintiff and succeeded in the first Court. On appeal the suit was dismissed. The plaintiff thereupon sued the defendant for damages on

6. (12) 16 C. L. J. 34; 16 I. C. 443, Bhutnath Pal v. Chandra Binode Pal.

7. (15) 2 A. I. R. 1915 Cal. 173; 26 I. C. 296; 42 Cal. 550; 21 C. L. J. 68; 18 C. W. N. 1189, Mohini Mohan v. Surendranarain Singh.

the ground that the suit for injunction was instituted maliciously and without reasonable and probable cause. The trial Court dismissed the suit on the ground of limitation. On appeal to this Court, the decision of the trial Court was affirmed and the learned Judges held further that a suit of this description where damages were claimed for a malicious institution of a civil action, was not maintainable in law. It may be pointed out, that as the learned Judges expressly held that the suit was barred by limitation their observations regarding the maintainability of the suit were more or less in the nature of an obiter. It may further be noted that damages were claimed in this case on account of the improper institution of the suit itself and not merely because any temporary injunction was obtained on insufficient grounds. The propriety of the decision in 16 C. L. J. 34⁶ was doubted very much by Sir Lancelot Sanderson C. J. and Duval J. in 31 C. L. J. 495.⁸ In this case there was a claim for damages for wrongful detention of the plaintiff's goods under an order of injunction obtained by the defendants. The learned Chief Justice in course of his judgment observed:

"The injunction obtained by the defendants was a judicial order which was not void for want of jurisdiction and, consequently the act of the defendants could not amount to trespass in law."

As the learned Judges did not agree with the view taken in 16 C. L. J. 34⁶ referred to above, the matter was referred for decision to a Full Bench. The judgment of the Full Bench is reported at p. 500 of the same volume, 31 C. L. J. 495.⁸ It is a short judgment delivered by Sir Asutosh Mookerjee Ag. C. J., who presided over the Full Bench. All that is said in the judgment is that,

"There are two sets of decisions in the reports: In one set it is laid down that a person, who unlawfully interferes with the exercise of the property rights of another commits an act in the nature of trespass to property and is liable for damages in an action for trespass. In the other series of cases it is laid down that no suit lies for damages against a defendant for maliciously and without reasonable and probable cause, instituting a civil action."

"Whether a particular case would come within the purview of one principle or the other would depend upon the facts of each particular case." The result was that the Full Bench referred the case back to the Division Bench for final disposal in accordance with the two sets of decisions to which reference was made. The case was ultimately heard by Mookerjee and Fletcher JJ.: *vide* 32 C. L. J. 236.⁹ The learned

8. (20) 7 A. I. R. 1920 Cal. 357; 31 C. L. J. 495 (F.B.), Narendranath Koer v. Bhusan Chandra Pal.

9. (20) 7 A. I. R. 1920 Cal. 846; 60 I. C. 280; 32 C. L. J. 236, Bhusan Chandra Pal v. Narendranath.

a Judges held on the facts of the case that as the damage suffered by the plaintiff was attributable to the wrongful attachment of his property made at the instance of the defendant, the case was one of trespass and fell within the principle laid down in (1910) 2 K. B. 244.² The contention raised on behalf of the plaintiff that the detention of the property being under orders of the Court the plaintiff was protected from an action of trespass was negatived on the ground that the root of the mischief was the wrongful attachment effected at the instance of the defendant. It may be possible to justify the decision from one standpoint. As was laid down by the Judicial Committee in 17 I. A. 17,¹⁰ where there is wrongful attachment of the plaintiff's goods at the instance of the defendant it is considered, according to the law and practice in India, the direct act of the party and not of the Court. Warrants for attachment are issued on the ex parte application of the creditor who is bound to specify the property which he desires to attach. If he points out certain property as the property of the judgment-debtor the Court or its officer has no discretion to exercise in the matter at that stage. It can, therefore, be said to be an act of the party and not an act of the Court. But the position would be undoubtedly different where the Court after hearing both parties passed an order of injunction restraining a party from doing certain things with regard to the property in suit. Here there is not only a judicial order imposing the restraint but there is no actual entry upon the property of the plaintiff.

In 32 C. L. J. 236⁹ there was originally a wrongful attachment of plaintiff's goods at the instance of the defendant. The plaintiff, however, succeeded in the claim proceeding and the defendant thereupon instituted a suit d under O. 21, R. 63, Civil P. C., and pending the hearing of the suit got an injunction by which the goods were directed to be kept in the custody of the Court so long as the suit was not decided. It may be argued that as originally the act of the defendant amounted to trespass the subsequent order of the Court could not afford a protection to the defendant. But even if we can justify the decision in 32 C. L. J. 236⁹ there is no justification for the decision in 16 C. L. J. 34.⁶ There the act was an act of the Court and there was no seizure or detention of the plaintiff's property.

The matter again came up for considera-

tion before this Court in 46 C. L. J. 455.¹¹ This was a suit brought by the plaintiff-respondent to recover damages from the defendant-appellant inter alia on the ground that the latter instituted a suit falsely and maliciously against the plaintiff on the original side of this Court and got an injunction restraining the plaintiff from disposing of a large quantity of cigarettes imported by him, which were also illegally detained by the Collector of Customs on the application of the defendant under the Sea Customs Act. The defendant had given an undertaking in damages when the injunction was granted. The injunction was subsequently dissolved and the suit f was eventually dismissed. The plaintiff instead of making an application for enforcement of the undertaking brought a regular suit claiming damages for unlawful detention of his goods by the defendant. The suit was valued at Rs. 7½ lacs. Pearson J. who heard the suit decided in favour of the plaintiff. The suit was decreed and a reference was made for ascertaining the amount of damages. On appeal the judgment was reversed by the Appeal Bench. Rankin C. J. in course of his judgment pointed out that so far as the plaintiff's claim rested on the ground of an interlocutory injunction being taken against him g by the defendant company which resulted in loss of his goods, there was no suggestion of any false statement or suppression of facts made by the defendant company. The affidavits even were not put in evidence and the suit itself was peremptorily disposed of. Referring to the decision in 16 C. L. J. 34⁶ the learned Chief Justice observed as follows :

"Apart from malice or want of probable cause, a plaintiff can recover damages in an independent suit upon mere proof that an injunction was granted to restrain him from doing what has since been held to be within his rights—this too is a proposition I dissent from. It is to be found in the case cited, but it proceeds upon a misunderstanding of such cases as h (1910) 2 K. B. 244² which are cases where trespass was committed and the defendant unsuccessfully set up as his justification an order of the Court which was disregarded because it was irregularly obtained by the defendant. To speak of an injunction as on a par with such a case as being an act in the nature of trespass to property, is merely to obscure matters by a false analogy or else to beg the question."

It was held by the Appeal Bench that the proper remedy of the plaintiff was to file an application before the Court which tried the suit to enforce the undertaking in damages given by the defendant company. The learned Judges treated the suit itself as an application of this character and directed an

10. ('90) 17 Cal. 436 : 17 I. A. 17 : 5 Sar. 472 (P.C.), *Kissory Mohun v. Hursook Das*.

11. ('28) 15 A.I.R. 1928 Cal. 1 : 106 I. C. 277 : 46 C. L. J. 455, *Imperial Tobacco Co. v. A. Bonnan*.

a inquiry as to the sum to which the plaintiff was entitled as damages for the loss caused to him by the injunction. Not being satisfied with this order the plaintiff took an appeal to His Majesty in Council and the appeal was dismissed: *vide* 50 C.L.J. 351.¹² The material portion of the judgment of the Judicial Committee relevant for our present purpose runs as follows:

b "On 21st January 1925 he (the plaintiff) instituted in the Calcutta High Court the suit out of which the present appeal arises claiming from the respondent damages amounting in all to over Rs. 7 lacs on the allegation that the former proceedings were taken maliciously without reasonable and probable cause. The trial Judge (Pearson J.) held that this had been established by the appellant; the Court of appeal held that it had not and the main argument before their Lordships has turned on this difference of opinion, it being now admitted by the appellant that if the view taken by the appellate Court is right his suit as a substantial claim for damages must necessarily fail. It had been contended in India that proof of malice and want of reasonable and probable cause was not of the essence of such a suit as that brought by the appellant. But this contention was not pressed before their Lordships."

c It is true that the point was conceded and not expressly decided but the appeal was dismissed and the decision of the Appeal Bench of this Court was affirmed. If the act of the defendant in taking out an injunction against the plaintiff by itself amounted to trespass in law, this question of malice and want of reasonable cause would have been perfectly irrelevant. It must be taken therefore that their Lordships expressly approved of the view taken by this Court in appeal that it was essential in such a case to prove malice and want of reasonable and probable cause. We may refer further in this connexion to the still later pronouncement of the Judicial Committee in 61 M. L. J. 330.¹³ There also the distinction between an action of trespass and a malicious abuse of the process of the Court was clearly pointed out by their Lordships.

d It was said that a distinction must always be drawn between acts done without judicial sanction and acts done under judicial sanction improperly obtained. If goods are seized under a writ of warrant which authorized the seizure, the seizure is lawful and no action will lie in respect of the seizure unless the person complaining can establish a remedy by some such action as for malicious prosecution. If, however, the writ of warrant did not authorize the seizure of the goods seized

an action would lie for damages occasioned by wrongful seizure without proof of malice. In our opinion these decisions of the Judicial Committee have settled the law on this point and the decision in 16 C. L. J. 34^b can no longer be looked upon as a binding authority.

It may be true, as Mr. Das contends, that for the purpose of getting a relief under S. 95 Civil P. C., no malice or want of reasonable and probable cause need be proved; but we agree with the view taken by the Madras High Court in 35 Mad. 598¹⁴ that there is no reason for holding that the section in any way interferes with the principles regulating suits for damages for abuse of the processes of the Court. The section allows a limited remedy without proof of malice which is open to a party to avail himself of if he chooses, but if he is not satisfied with this summary remedy and files a suit for compensation in the regular way, he must prove the essential ingredients of a malicious abuse of the Court's processes.

Our conclusion, therefore, is that the plaintiff is not entitled to any damages in the suit filed by her unless she succeeds in making out that the application for injunction was made by the defendant without any reasonable and probable cause and that they acted from an improper motive. As there is no such finding arrived at by either of the Courts below, we would ordinarily have had to send the case back in order that this question might be decided on the evidence in the record. Mr. Das has prayed before us that he might be allowed to convert this suit into an application under S. 95, Civil P. C. It is true that the claim is below Rs. 1000 and the proceeding would have to be taken in the same Court in which the suit was filed, and as no question of jurisdiction is involved the question undoubtedly becomes one of costs and of discretion. We think that in the circumstances of this case it will meet the ends of justice if we accede to the prayer of Mr. Das and allow him to apply for treating the suit itself as an application under S. 95, Civil P. C.

The result is that the appeal is allowed and the judgments and decrees of the Courts below are set aside. The matter will go back to the trial Judge and the plaintiff will be at liberty to make the necessary application for converting this suit into a proceeding under S. 95, Civil P. C. It will be open to the defendants to file petition of objection, if necessary, in the usual way and the case will be heard

12. ('29) 16 A. I. R. 1929 P.C. 222 : 119 I.C. 609 : 50 C. L. J. 351 (P. C.), *Allbert Bonnan v. Imperial Tobacco Co.*

13. ('31) 18 A.I.R. 1931 P.C. 28 : 130 I.C. 310 : 61 M. L. J. 330 (P. C.), *Ramanathan Chetty v. Meera Saibo.*

14. ('12) 35 Mad. 598 : 12 I. C. 507 : 21 M. L. J. 1052 : (1911) 2 M. W. N. 414, *Nanjappa v. Ganapathe.*

and disposed of by the Munsif in accordance with law. It is conceded by Mr. Das that his client must confine her claim to the damages suffered by her on account of the injunction granted by the original Court in the previous suit. The loss sustained by her on account of the injunction granted by the appellate Court would lie outside the purview of the application under S. 95, Civil P. C., as that can only be determined by the Court which granted the injunction. The appeal is therefore allowed. The appellants will be entitled to the costs of this Court as well as of the lower appellate Court. We assess the hearing fee in this Court at two gold mohurs.

SHARPE J. — I agree.

LODGE AND DAS JJ.

Karamali Sikdar v. Emperor.

Cr. A. No. 472 of 1942, D/- 4-6-1943.

(a) Criminal trial — Jury — Evidence against two accused same—Jury finding one guilty and other not guilty—Jury could not necessarily have been confused. [P 298 C 1]

(b) Criminal trial — Charge to jury—Misdirection—That Judge did not emphasise evidence does not amount to misdirection. [P 298 C 2]

(c) Criminal trial — Evidence — Evidence of each witness bearing strong resemblance to that of other—Witnesses cannot necessarily be said to have deposed in parrot fashion. [P 298 C 2]

(d) Criminal trial—Charge to jury—Misdirection — Witnesses named in first information report not examined — Judge mentioning aforesaid fact to jury and adding explanation for non-examination given by prosecution — Judge asking jury not to draw adverse inference if the case loses nothing by non-examination held did not amount to misdirection. [P 299 C 1]

(e) Criminal trial—Charge to jury — Misdirection—Omission by Judge to address to jury argument as to possibility of accused not having been present at occurrence held not misdirection. [P 299 C 1]

(f) Criminal trial—Charge to jury—Misdirection — Witness identifying accused short sighted—Accused in close contact with witness during occurrence of crime —Omission to emphasise aforesaid fact in charge to jury held did not amount to misdirection. [P 299 C 2]

LODGE J. — This is an appeal against convictions and sentences under Ss. 148, 147 and 325/34, Penal Code. Twelve persons were placed on their trial before the Additional Sessions Judge of Dacca and a common jury of five. The charges against them framed by the Sessions Court, were that they were members of an unlawful assembly the common object of which was severely to assault Khan Sahib Samsuddin Ahmed, that they were armed with deadly weapons and thereby committed an offence punishable under S. 148, Penal Code; secondly, that they attempted to murder Khan Sahib Samsuddin Ahmed and thereby committed an offence punishable under S. 307, Penal Code; thirdly, that they in furtherance of the common intention of all namely severely to assault Khan Sahib Samsuddin Ahmed voluntarily caused grievous hurt to him and thereby committed an offence punishable under Section 326/34, Penal Code. The charge framed by the Magistrate was dropped. The jury were unanimous in their verdict. They found five of the accused persons Kushai, Abdus Salam, Nawabali, Ledu and Falania not guilty of any offence. They found Karamali Sikdar, Boul Sikdar alias Abdul Hai and Kalu guilty of rioting being armed with deadly weapons and guilty of causing grievous hurt under S. 325/34, Penal Code. They found four others namely Imanali Sikdar, Rokman Ali, Yakub and Budhai guilty of rioting under S. 147, Penal Code, and guilty of voluntarily causing grievous hurt under S. 325/34, Penal Code. The learned Additional Sessions Judge accepted the unanimous verdict of the jury and acquitted Nawabali, Faloo, Kushai, Salam and Ledu Sheik. He convicted Karamali Sikdar, Boul Sikdar,

Kalu and sentenced them each under S. 325/34, Penal Code, to undergo rigorous imprisonment for three and a half years and under S. 148, Penal Code, to undergo rigorous imprisonment for two and a half years. He convicted Imanali Sikdar, Rokman Sikdar, Yakub and Budhai of voluntarily causing grievous hurt and sentenced them each under S. 325/34, Penal Code, to undergo rigorous imprisonment for three and a half years and he convicted them also of rioting and sentenced them each under S. 147, Penal Code, to undergo rigorous imprisonment for two years, the sentences in the case of all the seven accused persons were to run concurrently. The seven accused persons have appealed against those convictions and sentences.

The case for the prosecution briefly is that Khan Sahib Samsuddin Ahmed had been the President of Hazratpur Union Board for 10 or 12 years. Towards the end of 1941 new elections to the Union Board and new election of the President of the Union Board became due. Khan Sahib Samsuddin Ahmed stood as a candidate in all the three wards of the Union Board and he was opposed in all the three wards. There was brisk canvassing and feelings ran high. The local Circle Officer anticipated trouble at the time of the elections and asked that armed police should be present when the elections were held. The election had to be postponed and canvassing continued up to the end of 1941 and during the opening weeks of 1942. In December 1941 Khan Sahib Samsuddin Ahmed complained to the police that some of his opponents were threatening the people in the locality to prevent them voting for and supporting him. On 9th February 1942 Khan Sahib Samsuddin Ahmed accompanied by a few followers went out canvassing. In the afternoon of that day he went with his followers towards Talipur village partly for the purpose of canvassing and partly for supervising an enclosure which was to be erected there. After making certain enquiries at Talipur he proceeded thence towards village Niltek. As he was on his way he heard a cry that people were approaching to assault him. He turned back and found a group of people, 30 or 40 in number, approaching to attack them. Among the 30 or 40 people approaching were the seven appellants. Imanali appellant struck the Khan Sahib on the back with a lathi. Karamali Sikdar appellant struck Khan Sahib on the right leg with a lathi whereupon the Khan Sahib fell on the ground. The other appellants then struck him in various parts of the body. Two of his companions succeeded in warding off some of the blows, and one of these companions stood over the Khan Sahib after the latter fell to the ground and warded off blows with the lathi which he was carrying. At this stage Karamali Sikdar appellant gave orders to his son Boul appellant whereupon Boul struck the Khan Sahib on the right side of the neck with a big dagger. The Khan Sahib grasped that dagger in his two hands and in so doing received injuries on his thumb and finger. Korban Dhali and Forman Dhali, Khan Sahib's followers pushed Boul Sikdar back. At this stage Karamali took a chen dao from the hands of Kalu appellant and struck Khan Sahib a blow therewith on the right side of the head. Thereafter the Khan Sahib and his party began to run away. As people working in the fields approached, the accused also fled to the west. Khan Sahib Samsuddin Ahmed was taken home and was ultimately attended by a doctor at his village home and subsequently sent to the Mitford Hospital for treatment and medical examination. (After referring to the medical evidence and to the evidence of alibi of certain accused the judgment proceeded.) None of the other accused offered any evidence to show that they could not have been present at the place of occurrence. These other accused, therefore, relied on the defects of the prosecution case and argued that the evidence to establish their presence was unsatisfactory, unreliable and unconvincing. Before drawing our attention to any alleged misdirections in the charge to the jury Mr. Carden Noad for the appellants drew our attention to the nature of the evidence against the accused

Karamali Sikdar, Faloo alias Falania and Ledu Sheik and again to the nature of the evidence against Abdus Salam and Budhai. Mr. Carden Noad argued that the evidence against Karamali Sikdar, Faloo and Ledu Sheik was almost identically the same. The same witnesses implicated these three accused persons. The same witnesses described the occurrence and ascribed the same part to these three accused. Moreover, the same defence witnesses deposed to the same alibi for these three accused persons. D. Ws. 1 to 5 all asserted that these three accused persons were at Kaladia H. E. School throughout the day on 9th February 1942. Mr. Carden Noad argued that the evidence for and against these three accused persons is indistinguishable; yet the jury have found the accused Karamali Sikdar guilty and have found the accused Faloo alias Falania and Ledu Sheik not guilty. Similarly with regard to Abdus Salam and Budhai one witness only deposed against these two accused persons. His evidence against them is the same. It is impossible from his evidence to distinguish between the two accused persons. No defence witness was examined on behalf of either of these two accused persons. Each of them asserted that he was elsewhere at the time of the occurrence. Neither of them made any attempt to prove that his assertion was true. In respect of these two appellants Mr. Carden Noad has contended that the evidence is indistinguishable; yet the jury have found Salam not guilty and have found Budhai guilty under S. 147 and under S. 325/34, Penal Code. From these facts Mr. Noad has argued that the jury in fact made a confusion in their verdict and that the verdict as given by them does not represent their real opinion. Mr. Carden Noad went further and suggested that this view was clearly entertained by the learned Additional Sessions Judge himself. To support this contention Mr. Carden Noad drew our attention to the last question put to the jury when their verdict was obtained. The question is: "Have you made any confusion as to names?" The answer was "No".

It has been argued before us and strenuously argued that in view of the facts stated above the jury made a confusion as to the names and that the verdict given by them does not represent their true verdict. We are unable to accept this contention. The mere fact that in the written record the evidence against two persons seems to be the same does not mean that the impression created by the witnesses on the mind of the jury is necessarily the same with respect to the two accused persons. The manner in which the witnesses deposed as they implicated one or the other may have varied. The opinion formed by the jury from the appearance of the accused may have had some effect. It seems to us impossible to argue that because the written record seems to be the same with regard to two different accused, the jury in distinguishing between the cases of those two accused must necessarily have been in a state of mental confusion. In any case so far as the present accused is concerned, this argument is scarcely applicable at all events to the case of Karamali Sikdar. There was one important piece of evidence against Karamali Sikdar which was not present in the case of Faloo alias Falania and Ledu Sheik. It was the case for the prosecution that Khan Sahib Samsuddin Ahmed lost consciousness shortly after the occurrence and did not regain his senses until about 9 P. M. When he regained his senses the Circle Officer was present and questioned him. The Circle Officer deposed that Khan Sahib Samsuddin Ahmed then described the occurrence and named 8 or 10 of his assailants. The Circle Officer was not able to remember the names of any of these assailants except Karamali Sikdar. The Circle Officer was definite that Samsuddin Ahmed immediately after recovering consciousness named Karamali Sikdar as one of his assailants. In view of this evidence it is impossible to argue that the jury had no reason for distinguishing between the cases of Karamali Sikdar and the cases of Faloo alias Falania and Ledu Sheik.

Mr. Carden Noad next argued that there were misdirections in the charge to the jury. The alleged misdirections will be considered *seriatim*. In the first place Mr. Carden Noad drew our attention to the evidence of two chowkidars Mongal Chowkidar, P. W. 15 and Gobinda Mondal Chowkidar, P. W. 16. Mongal Chowkidar deposed in his cross-examination as follows:

"I know some of the accused from before. I did not see the accused other than Akubali and Kalu. I do not know the other people who came with Kalu and Akub Ali. I knew Karamali, Nawabali from before and no other accused." Gobinda Mondal Chowkidar deposed in his cross-examination: "I saw only Kalu (accused) of village Khana Kandi amongst the assailant party. I did not see Nawabali Hazi. I know Karamali Hazi from before. I did not see him there." In dealing with this evidence the learned Judge addressed the jury as follows: "It has been argued that the evidence of the two chowkidars that they recognized only Yakub alias Akubali and Kaloo and no other men raises a strong suspicion that the accused Karamali, Nawabali and others were not there. These chowkidars admit that they knew Karamali and Nawabali from before. You will consider this point." Mr. Carden Noad has argued before us that this is an inadequate presentation of the evidence of the two chowkidars and that the learned Judge ought to have emphasised the evidence more strongly and to have pointed out that the evidence of these witnesses if true was sufficient to establish the innocence of Karamali Sikdar and Nawabali at least. I am not impressed by this argument. The learned Judge dealt with the evidence of these two witnesses in cautious and restrained language. He might easily have placed before the jury arguments suggesting that these chowkidars who asserted that they could not recognise well-known people in the locality in broad daylight might have been suppressing the truth. He might equally have emphasised the evidence more strongly in favour of the accused as Mr. Carden Noad has suggested. But the fact that he has contented himself with placing the evidence and has avoided extreme or over-emphatic language does not in my opinion amount to a misdirection.

Mr. Carden Noad then drew our attention to the evidence of the main prosecution witnesses to the occurrence namely P. W. 1 Khan Sahib Samsuddin Ahmed, P. W. 3 Korban Dhali, P. W. 4 Forman Ali Dhali, P. W. 7, Wahid Ali, P. W. 11 Syed Aulad Hossain alias Fagad Mia and P. W. 12 Mohamad Jan and argued that these witnesses have given not merely substantially the same description of the occurrence but have given descriptions which agree in so many details that it must be held that their evidence was given in parrot fashion each repeating the same story. Mr. Carden Noad contended that the learned Judge ought to have told the jury that evidence given in such a parrot fashion is not reliable and should be distrusted. Here, again, the fact that the written record of the evidence of each witness bears a strong resemblance to that of each of the other witnesses does not necessarily mean that the witnesses were deposing in parrot fashion. These witnesses deposed in answer to questions put to them by one who desired to elicit from each of the witnesses all the important details. The evidence was recorded by a Judge who had heard the whole story given and knew the details which were considered relevant. In these circumstances it is not strange that the details should have been obtained from the various witnesses in the same order and recorded in the same order. The fact remains that the learned Judge did not note with regard to the evidence of these witnesses that they deposed in a manner which suggested that they were all reciting the same story, and in the absence of anything to indicate that the learned Judge himself thought that they deposed in parrot fashion it seems to me unreasonable to argue that the learned Judge ought to have told the jury that such was the method of their deposition.

Thirdly, Mr. Carden Noad drew our attention to the

fact that four persons were named as witnesses to the occurrence in the first information report who were not examined as witnesses in the Court of Session. Mr. Carden Noad has argued that the directions given by the learned Judge regarding the non-examination of these witnesses was insufficient. On this point after drawing the attention of the jury to the evidence showing that these persons had been named as material witnesses and drawing their attention to the fact that they had not been examined as witnesses the learned Judge then gave the explanation which had been offered by the prosecution for the non-examination of the witnesses. He observed as follows :

"The prosecution explains that as Ekabbar, Mukshudali, Ayetali and Nadu were not actually present at the time of assault and as they are also related to the accused party they have not been examined." The learned Judge proceeded to give the evidence on record regarding the relationship between these persons and various members of the accused party. Having done so he explained the law on the subject in these words : "The law on this point is that no particular number of witnesses is required to prove a fact. It is the quality of evidence and not quantity that counts. But all material witnesses must be examined and if any such is left out without any sufficient explanation you may draw a presumption that such witness if produced, would not have supported the prosecution case. If, however, the case loses nothing by his absence no presumption adverse to the prosecution need be drawn. As to whether a particular witness is material or not or whether the explanation of the prosecution for not producing any material witness is sufficient or not, you are the sole judges." There can be no doubt that the learned Judge gave a correct exposition of the law. Mr. Carden Noad's objection to this exposition is that in addition to giving a correct explanation the learned Judge added this sentence. "If, however, the case loses nothing by his absence no presumption adverse to the prosecution need be drawn." Mr. Carden Noad has argued that the inclusion of this sentence in the explanation destroys the value of the explanation given and is in itself a misdirection. The sentence in English is not easy to understand and it must be remembered that the charge to the jury was given in Bengali and consequently the actual sentence was almost certainly in other words. I am not satisfied that the inclusion of this sentence in the explanation when the rest of the explanation is obviously correct and complete amounts to a misdirection.

Mr. Carden Noad next drew our attention to the learned Judge's references to the evidence of alibi given on behalf of the accused. The learned Judge suggested to the jury that the mere fact that an accused person was proved to be at a place 2 or 3 miles distant from the scene of occurrence an hour before the occurrence took place was not inconsistent with his having taken part in the occurrence. Mr. Carden Noad asks us to hold that from the nature of the occurrence it could not have been premeditated and that therefore as the accused could not have known where their victim was to be at 4-30 P. M. on 9th February 1942, they could not possibly have been at a place 2 or 3 miles from the scene of occurrence at 3-30 P. M. and have taken part in the occurrence at 4-30 P. M. This is an argument which might reasonably have been addressed to the jury. But the omission of this particular argument from an otherwise satisfactory charge can scarcely be held to be a misdirection. Mr. Carden Noad then drew our attention to the evidence of P. W. 3 Korban Dhali who admitted that he was short-sighted and that he was unable to identify the accused persons from a distance of 8 or 10 cubits though he was able to identify them when he went close up to them. Mr. Carden Noad argued that the learned Judge ought to have drawn pointed attention of the jury to this evidence and asked them to distrust the evidence of identification given by this witness. This witness is Korban Dhali, the person who is said to have stood over Khan

Sahib Samsuddin Ahmed during the attack. If his description of the occurrence is true, the people whom he recognised must have been in close contact with him during the occurrence and there seems to be no reason why he should not have been able to recognise them during the occurrence. The mere fact that he was short-sighted and unable to recognise people at some little distance away does not seem to me a fact of such importance that the learned Judge ought to have emphasised it in his charge. These are all the criticisms which Mr. Carden Noad made of the charge to the jury. I am unable to agree that any of these indicates that there was a misdirection in the charge or that the verdict of the jury was erroneous on account of such misdirection. We have read the charge carefully. The charge is worded in cautious and restrained language. It is fair and in my opinion complete and it seems to me that the charge marshals the evidence fairly and puts a clear and correct view of the evidence before the jury. In my opinion, it is impossible to find serious fault with the charge or to hold that there is any misdirection in it. In this view the convictions must be upheld. (His Lordship then upheld the convictions but modified the sentences and concluded.) The appeal is disposed of accordingly. The appellants must surrender to their bail and serve out the remaining term of their sentences.

DAS J. — I agree.

R. C. MITTER AND SHARPE JJ.

Abdus Salam v. Haji Abdul Aziz.

Civil Rule No. 1639 of 1939, D/- 1-3-1944.

(a) Mahomedan law—Mutwalli—Minor cannot act — During minority, kazi must appoint another to act for minor. [P 300 C 1]

(b) Mahomedan law—Wakf—In the case of a private wakf the Local Government need not appoint any judicial officer to discharge the functions of a kazi because the Judges of civil Courts by reason of their office occupy that position. [P 300 C 2]

ORDER.—Md. Hatim Choudhury of village Bata-rashi executed a deed of wakf on 6th Kartic 1328 B. S. At the time of the execution of the deed of wakf his only son Taiyab Ali had disappeared and there was no news about his whereabouts. Under the deed of wakf, he appointed his relation Khan Sahib Abdul Salam Choudhury as the first mutwalli subject to a condition. The condition was that on the return of his son the latter was to be the mutwalli in the place of Khan Sahib Abdus Salam Choudhury but if he showed signs of abnormality, the Khan Sahib was to continue to be in charge of the management of the wakf properties. After the death of the wakif Md. Hatim Choudhury, Taiyab Ali returned. He was a normal man with the result that the Khan Sahib made over possession of the wakf properties to him. Thereafter, Taiyab Ali died leaving a minor son Mukammil Ali. According to the terms of the wakfnama, Mukammil Ali became the de jure mutwalli in the contingency that had happened. In 1939, Taiyab Ali's widow, Sayera Banu, made an application to the District Judge of Sylhet for the appointment of a person to discharge the function of the mutwalli during the minority of her son. That application was numbered Misc. Case No. 3 of 1939. On 6th April 1939, the then District Judge, Mr. Hindley made a consent order. By the consent order, the Khan Sahib was appointed mutwalli for a period of one year with a reservation that he was to continue as mutwalli during the minority of the de jure mutwalli, Mukammil Ali, if he conducted himself well in the management of the wakf properties and in discharging the duties of a mutwalli. The consent order further provided that if any question of removal arose the claim of Mukammil Ali's mother to be appointed mutwalli during the minority of her son would receive first consideration. On the appointment so made, the Khan Sahib became mutwalli on furnishing security which he was required to furnish by the aforesaid order.

On the expiry of the term of his appointment he continued to discharge the duties of a mutwalli with the sufferance of the District Judge. In 1942, Mukammil Ali's mother made an application to the District Judge for the removal of the Khan Sahib from his office. In that application he charged the Khan Sahib with mismanagement of the wakf properties and misappropriation. That application was opposed by the Khan Sahib on the ground that he was the rightful mutwalli in possession and the District Judge had no jurisdiction to remove him. The matter was heard by Mr. S. K. Haldar, the then District Judge of Sylhet, who had succeeded Mr. Hindley. In his order No. 42, dated 5th September 1942, he gave effect to the contentions of the Khan Sahib and held that he had no jurisdiction to entertain the said application. The reasons that he gave in his order were that the wakf in question was private wakf and in such a case only the Kazi could appoint or dismiss a mutwalli but inasmuch as the Local Government had not appointed either him or any other Judicial Officer to be Kazi he had no jurisdiction in the matter. In making the last mentioned observation, he quoted with approval the obiter of this Court in 43 Cal. 467.¹ Thereafter Mukammil Ali's mother made an application before the District Judge for being appointed the guardian of the person and property of her minor son. This application was under the Guardianship Act. On 22nd December 1942, the learned District Judge appointed her guardian of the person and property of her minor son Mukammil Ali. After that, she made another application in Misc. Case No. 3 of 1939 to the District Judge for removing the Khan Sahib from office of mutwalli. This application was heard by Mr. Ispahani who is now the District Judge of Sylhet. It was disposed of by order No. 49 dated 7th August 1943. The learned District Judge took the view that the appointment of Sayera Banu, the mother of Mukammil Ali, as guardian of the person and property of her minor son on 22nd November 1942 had washed out all previous orders including the order by which the Khan Sahib had been appointed mutwalli by Mr. Hindley. The Khan Sahib was, therefore, according to him not the mutwalli. He directed the Khan Sahib to make over all account books and other papers connected with the wakf estate through Court to Sayera Banu, the guardian of the minor. This is one of the orders which is sought to be revised by this Court by the Khan Sahib who is the petitioner before us. Later on, the Khan Sahib applied to the learned District Judge for re-consideration of the aforesaid order but he failed. By an order dated 17th September 1943, the learned District Judge directed the Khan Sahib to comply with the directions contained in his order of 7th August 1943 at once. The Khan Sahib, however, did not put in all the papers and account books in pursuance of the orders passed by the Court with the result that on the application of Sayera Banu, the learned District Judge fined him Rs. 100 for not obeying his orders regarding the production in Court of the account-books and other papers concerning the wakf estate. This order is order No. 58 dated 25th September 1943. This order is also the subject-matter of this revision case.

The petitioner before us urges that the learned District Judge had no jurisdiction to pass the order of 7th August 1943 concerning the mutwalliship. He urges that he could be removed by a proper Court in a suit only. He challenges the order by which fine has been imposed upon him on the ground that it is an irregular order passed in his absence and without any notice to him. We will deal with his contentions in the order indicated above. According to the Mahomedan law, a minor cannot act as mutwalli. If the office of mutwalli devolves upon a minor a person must be appointed by the Kazi to discharge the functions of the mutwalli during the minority of the de jure mutwalli. Two questions arise : (1) Who is the Kazi when the wakf is a

1. ('16) 3 A. I. R. 1916 Cal. 894; 43 Cal. 467, Atimannessa Bibi v. Abdul Sobhan.

private wakf; and (2) assuming that the Kazi is the District Judge what procedure must be followed to have an appointment of a person who is to discharge the functions of a mutwalli during the minority of the de jure mutwalli. In a number of cases before 1915 it was assumed by this Court that the District Judge was the Kazi. The question, however, was considered in some detail by Mookerjee and Beachcroft JJ. in 43 Cal. 467.¹ After an examination of the Arabic texts, the learned Judges came to the conclusion that in Mahomedan States it was only the chief Kazi who could control the administration of wakf properties. They further expressed the view that by reason of the provisions of S. 92, Civil P. C., the District Judge may be taken to be the chief Kazi in British India where the wakf was a public one. They further expressed the view that in respect of private wakfs, there is no judicial officer who can exercise the functions of a Kazi. They made a suggestion that it was for the Local Government to appoint a judicial officer to discharge the functions of a Kazi in the matter of administration of private wakfs. All these observations of the learned Judges however are obiter. That judgment was pronounced in the year 1915. In 1916, the question was considered by the Judicial Committee in 24 C. L. J. 198 = 43 I. A. 127.² The judgment of the Board was delivered by the Right Hon'ble Mr. Ameer Ali. That case concerned a mosque and its appurtenances in the city of Rangoon. The question before the Court related to the appointment of a mutwalli. In that case the following observations were made by the Judicial Committee :

"In these circumstances, it seems to their Lordships in the exercise of the discretion which the Mahomedan law vests in the kazi, that the Rancheria section of the worshippers all other conditions being equal, are preferably entitled to the mutwalliship of the mosque." That was the actual decision. In the course of the judgment, they made the further observation : "Generally speaking, in case of wakf or trust created for specific individuals or a determinate body of individuals, the kazi whose place in the British Indian system is taken by the civil Court, has in carrying the trust into execution to give effect so far as possible to the expressed wishes of the founder." The decision in 43 I. A. 127² cited above has put it beyond doubt that the civil Courts in British India occupy the position of Kazi in the administration of wakfs. The observations made by Mookerjee and Beachcroft JJ. in 43 Cal. 467¹ to the effect that in the case of a private wakf there is no person in British India to discharge the judicial functions of a Kazi therefore, cannot be taken to be good law. The Local Government in such cases need not appoint any Judicial Officer to discharge the functions of a Kazi, because the Judges of civil Courts by reason of their office occupy that position. As the District Judge is the principal Judge in a district, he must be taken to be by reason of his office the chief Kazi and would have all the powers of a Kazi in respect of all wakfs. Whether a Subordinate Judge or a Munsif can perform the judicial functions of a Kazi in respect of wakfs is a point which need not be considered by us in this case and we reserve our opinion on that point. The District Judge therefore had jurisdiction to appoint a person to discharge the functions of a mutwalli during the minority of Mukammil Ali, the son of Taiyab Ali who according to the wakfnama is the de jure mutwalli.

The second question, namely, what would be the proper procedure to invoke the jurisdiction of the District Judge to make such an appointment is a question which is not material in the case before us. Two points of view can be formulated : (1) That the District Judge can be set in motion, (i) by an application, and (ii) by filing a suit. But that is only a question of procedure. In this case, the question does not arise because the order which Mr. Hindley made was a consent order. So far as the procedure is concerned, it is an established principle of law that by consent the parties can regulate their own

2. ('16) 3 A. I. R. 1916 P. C. 132; 43 I. A. 127; 24 C. L. J. 198 (P. C), Md. Ismail Ariff v. Ahmed Mola Dawood.

procedure in a Court which has a general jurisdiction to decide the subject-matter of a controversy. That position is well-established by the decision in 2 I. A. 219³ and (1874) L. R. 5 P. C. 516⁴ Mr. Hindley's order to which we have already made reference was therefore a legal order. The order passed by Mr. S. K. Haldar on 5th September 1942, cannot, in the view we have taken be considered to be a correct order. Mr. Ispahani who dealt with the matter was confronted with two orders of his predecessors which were inconsistent with each other. We are fortunately not in the same position as Mr. Ispahani. In the view that we have taken of the matter, we hold that the Khan Sahib derived his authority to be the mutwalli of the wakf estate solely by reason of Mr. Hindley's order. The term of his office expired in April 1940. He was suffered to continue. It is not a question of his removal from office. The true position is that there is no person appointed by the Court who can now discharge the functions of a mutwalli during the minority of Mukammil Ali. The appointment of Sayera Banu, the mother of Mukammil Ali as a guardian in the Act VIII case does not make her the mutwalli during the minority of her son. But the learned District Judge has put her in possession and has, by the notice issued in pursuance of his order dated 17th September 1943, notified to the tenants holding properties under the wakf estate that they are to recognise Sayera Banu as their landlord. In view of this fact, we do not at present wish to disturb the possession of Sayera Banu. Our order is that she is to continue in possession of the wakf estate as receiver till an appointment is made by the District Judge of a suitable person to act as mutwalli till Mukammil Ali attains majority according to Mahomedan law.

We, therefore, remand the case to the learned District Judge in order that he may appoint a suitable person to act as mutwalli till Mukammil Ali attains majority according to Mahomedan law on such terms and conditions as he may deem fit. It would be open to the learned District Judge to consider the claims of Sayera Banu as also the claims of the petitioner before us, namely, Khan Sahib Abdus Salam Choudhury and the claims of any other person who may be an applicant for the post. We cannot maintain the order by which fine has been imposed upon the Khan Sahib, the petitioner before us, as that was an ex parte order passed at the instance of Sayera Banu on an application of which no notice was given to the Khan Sahib. For this reason and this reason alone, we set aside the said order and direct the fine which has already been paid to be refunded to the Khan Sahib. There will be no order for costs in this rule. The learned District Judge is requested to dispose of the matter relating to the appointment of a person to act as mutwalli as early as possible. Let the records be sent down without delay.

3. ('75) 2 I. A. 219 (P.C.), Sadasiva v. Ramlinga.

4. (1874) L. R. 5 P. C. 516, Pisani v. Attorney-General, Gibraltar.

HENDERSON J.

Durga Charan Chatterjee v. Sm. Benodini Debi.

Appeal No. 176 of 1941, D/- 30-3-1944.

Civil P. C. (1908), Ss. 37 and 39;—Order for costs by High Court while refusing application for leave—Order can be executed only by Court to which it is transferred by High Court—Transferee Court cannot transfer it to another Court. [P 301C 2]

JUDGMENT. — This appeal is by the judgment-debtor. The decree under execution is one for costs. It consists of three parts (1) the costs awarded to the respondent by the 4th Subordinate Judge at Alipur in connexion with the respondent's application for probate, (2) the costs awarded by this Court dismissing an appeal by the appellant, and (3) the costs awarded by this Court refusing the appellant leave to appeal to the Privy Council. The respondent applied to the Subordinate Judge for a transfer of the decree and he transferred it under S. 39, Civil P. C., to the District Judge

at Howrah. He transferred it to a subordinate Court, i.e., the Court of the 2nd Munsif. The appellant then filed an objection under S. 47, Civil P. C., to the effect that the Court had no jurisdiction to execute the decree in these proceedings. The point of the appellant's case was that the Subordinate Judge had no power to execute the order of costs made on the application for leave to appeal to the Privy Council. The Munsif thought that this was a matter to be decided by the Subordinate Judge at Alipur. On that view he should have kept the matter pending until the question was decided. He however dismissed the objection. The appellant appealed. The District Judge held that the matter was to be decided by the Munsif and reached the conclusion that the objection had no substance in it. After that a certain property has been sold for a sum larger than the amount to be recovered by the execution. The learned District Judge was largely influenced by the fact that he thought that no harm had been done to the appellant by the procedure adopted. The harm done to the appellant is that his property has been sold for an inadequate sum. If the price paid had been adequate, the appellant would not have bothered to file the appeal and the respondent would not have refused to offer to take the whole of the money due. Inasmuch as the appellant's case is that the proceedings were without jurisdiction, it is quite immaterial whether he has suffered any loss or not.

It is not disputed that the respondent was entitled to apply to the Court of the Subordinate Judge for execution with regard to the first two items. In view however of the definition of "the Court which passed the decree" in S. 37, item 3 cannot possibly come within the jurisdiction of the Court of the Subordinate Judge. This order for costs was not made by this Court in appeal but in a special jurisdiction. That the Subordinate Judge had no jurisdiction to deal with the matter will be apparent from the decision of the Privy Council in 24 Mad. 1¹ and a decision of this Court in 6 Cal. 201.² On behalf of the respondent Mr. Chatterjee attempted to take advantage of the decision in 34 Cal. 860.³ That decision merely amounts to this that if this Court has no power to transfer the decree for execution under S. 39 then it must have inherent jurisdiction to do so. It does not say that a mere application for execution in the Court of the Subordinate Judge gives him jurisdiction. The order made by this Court on the appellant's application for leave to appeal has been placed before me. It was contended that it is an order to the Court for execution. I have perused it and it is nothing more than an ordinary copy sent to subordinate Court for information. But supposing it was an order for execution that would entitle the Subordinate Judge at Alipur to execute the decree but it would not enable him to transfer it under S. 39. Thus whatever view is taken of the matter it is quite clear that the Munsif in Howrah had no jurisdiction to deal with the case. As Mr. Chakravarty states that the whole of the decretal amount would be paid off out of Court, it is really only a matter of academic interest now. The appeal must accordingly be allowed. The orders of the Court below are set aside and the application of the appellant under S. 47 will be allowed. The execution case is dismissed and all proceedings subsequent to 1st May 1940 when the objection was filed, will be quashed. I make no order as to costs. Leave to appeal under Cl. 15, Letters Patent, is refused.

1. ('01) 24 Mad. 1 (P.C.), Venkata Subbamma v. Venkata-rama.

2. ('81) 6 Cal. 201, Hurro Pershad v. Bhupendra Narain.

3. ('07) 34 Cal. 860, Jogendra Chandra v. Wazidunnissa.

HENDERSON J.

Abdur Rasheed v. Maharaja Srish Chandra.

Appeals Nos. 131 to 140 of 1942, D/- 25-11-1943.

Bengal Tenancy Act (8 of 1885), S. 168A—Use of "entire" in S. 168A shows limits which are placed upon right of decree-holder—If decree can be satisfied by

sale of small portion of holding decree-holder is not compelled to bring whole tenure to sale. [P 302 C 1]

JUDGMENT.—These appeals are by the decree-holder. The judgment-debtor's estate is in the charge of the Court of Wards, and it is rather extraordinary to find them trying to dodge out of payment of rent. The question involved is the meaning of the word "entire" in S. 168A, Bengal Tenancy Act. The facts are these. The decrees are for rent due on a certain patni. The interest of the respondent is eight annas, the remaining eight annas belonging to a third person. When the appellant attempted to execute the decrees the respondent successfully defeated him by S. 10C, Court of Wards Act. He accordingly proceeded against the other judgment-debtor alone and put his share of the patni up to sale. Section 10C no longer affords any help to the respondent and the appellant is attempting to sell his share in the patni. The objection depends upon putting stress upon the word "entire" and the contention of the respondent was that the only way of realizing the amount is by putting up the whole patni to sale.

On a previous occasion I have held that there is no substance in this objection. Nothing which has transpired now would induce me to alter that opinion. Section 168A is obviously made to help tenants and not landlords. The use of the word "entire" shows the limits which are placed upon the right of the decree-holder. To hold that although the decree can be satisfied by the sale of a small portion of the holding, the decree-holder against his own wishes and in spite of the protest of the judgment-debtor is compelled to bring the whole tenure to sale, would be to the disadvantage of the tenant. The appeals are accordingly allowed, the orders of the Court of appeal below are set aside and those of the first Court restored. The respondent will pay the costs of the appellant in this Court and in the lower appellate Court—the costs of this Court being assessed at two gold mohurs. Dr. Basak asked for leave to appeal. I have already pointed out how inappropriate it is that the Court of Wards should try to dodge out of payment of rent and I shall do nothing to help them to do so. The leave asked for is refused.

NASIM ALI AND BLANK JJ.

Upendra Nath v. Kumar Bimalendu.

L. P. A. No. 1 of 1943, D/- 17-1-1944.

Limitation Act (1908), Art. 83—Liability under S. 222, Contract Act to indemnify the agent is a liability under a contract within the meaning of Art. 83, Limitation Act—Time begins to run when the agent is damnified, that is, when he makes the payment on behalf of the principal. [P 302 C 2]

JUDGMENT.—The facts so far as they are relevant for the purpose of this appeal are these: The defendant placed the plaintiff in charge of certain litigations started by one Rasik Chandra Khan against the defendant. The plaintiff spent Rs. 700 out of his own pocket in conducting these criminal proceedings. The criminal proceedings came to an end in July 1931. There was an adjustment of account between the plaintiff and the defendant in September 1935. On 5th January 1938 the plaintiff raised the present suit for recovery of these 700 rupees along with certain other sums due to him from the defendant. The point for determination in this appeal is whether the plaintiff's suit to recover Rs. 700 from the defendant advanced by him from his own pocket in conducting the criminal case is barred by limitation. Mitter J. has held that Art. 61, Limitation Act, applies to the facts of the present case. The learned Judge has further held that even if Art. 83 applies, the suit is barred by limitation.

The plaintiff was the defendant's agent for looking after the criminal litigations started by Rasik Chandra Khan against the defendant. Under S. 222, Contract Act, the employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him. It is not disputed in this case that the plaintiff

spent Rs. 700 out of his own pocket in exercise of the authority conferred upon him by the defendant. Under Art. 83, Limitation Act, a suit upon a contract to indemnify is to be brought within three years from the time when the plaintiff is actually damnified. In 34 Mad. 167,¹ the Madras High Court said: "The principal's duty to indemnify is no part of the contract (contract of agency). It is an obligation imposed by the law and is attached to the relation of principal and agent constituted by act of parties." According to this view, the liability of the principal to indemnify the agent under S. 222, Contract Act, is not a liability under a contract within the meaning of Art. 83, Limitation Act. In 26 I. C. 415,² the Punjab Chief Court held: "Section 222, Contract Act, purports to be and is an integral part of the law of contract and it merely affirms and expressly lays down one of the principles of the law of contract. In effect it says that, unless there be some agreement to the contrary, the establishment of the relation of principal and agent shall inevitably bring in its train the liability of the principal to indemnify the agent. The right, instead of being merely implied in accordance with general principles, is expressed clearly by the Statute." According to this decision of the Punjab Chief Court, the liability of the principal to indemnify the agent under S. 222, Contract Act, is a liability under a contract within the meaning of Art. 83, Limitation Act. In 16 C.W.N. 1040,³ Jenkins C. J. and Chatterjea J. observed: "As the contract is one of indemnity, the article that applies is Art. 83, possibly extended by Art. 116. But even if it be taken that Art. 83 alone is the governing article and the benefit of the extension provided by Art. 116 cannot be claimed, still the suit is within time, as it is within three years of the time when the plaintiff was actually damnified. All that was urged against this view is that a contract in Art. 83 means an express contract. I can see no warrant for placing that restricted meaning on the words of Art. 83. It is a meaning which the words do not themselves require, nor would it be in accordance with the view of contract expressed in the Contract Act." Once the relationship of principal and agent is established, S. 222, Contract Act, comes into operation. The obligation of the principal to indemnify the agent, therefore, flows from the nexus of the principal and agent. It is a part of the contract of agency, although it is an obligation imposed by statute. We are, therefore, of opinion that the liability under S. 222, Contract Act, to indemnify the agent is a liability under a contract within the meaning of Art. 83, Limitation Act. The question then is, when was the plaintiff actually damnified? An agent is damnified when he makes the payment on behalf of the principal; in other words, when the expenses incurred by him are recoverable. In this case, the agent made the payments long before three years before the institution of the present suit. The suit for recovery of money spent by the plaintiff on behalf of the defendant for conducting the criminal litigations must, therefore, be held to be barred by limitation under Art. 83, Limitation Act. The appeal accordingly fails and is dismissed. There will be no order as to costs.

1. ('11) 34 Mad. 167, *Kandaswamy v. Ayayambal*.
2. ('14) 1 A.I.R. 1914 Lah. 407:26 I. C. 415, *Manghi Ram v. Ram Saran Das Maman Chand*.
3. ('12) 16 C.W.N. 1040, *Ram Barai v. Sheodeni Singh*.

HENDERSON J.

Sri Ram Charan Sinha v. Gopi Nath.

C. R. No. 884 of 1943, D/- 29-7-1943.

Bengal Money Lenders Act (10 of 1940), S. 2 (12)—"Loan"—Loan includes transaction in which interest is payable in kind—Usufructuary mortgagor is borrower within S. 38 even when interest is payable in kind. [P 303 C 1]

ORDER.—This rule raises only one small point. It is directed against an order of the Subordinate Judge refusing to hear an application under S. 38, Bengal Money-Lenders Act, on the ground that it was not maintainable. The petitioners were largely responsible because they introduced into their petition a mass of

matters which could not arise on such an application and the major portion of the learned Judge's judgment is not germane to the real point. It is not necessary to set out many details for the decision of the present point. Suffice it to say that the opposite parties are in possession of certain properties as usufructuary mortgagees. A part of the usufruct is to be credited as interest and the balance to the reduction of the principal sum due. The actual lands are in possession of produce-paying tenants. Under S. 38 the petitioners are entitled to apply to the Court to take an account and make a declaration how much, if any, is now due to the opposite parties on account of the mortgage. Nothing else will arise for consideration. The learned Subordinate Judge rejected the application on the ground that a usufructuary mortgagor is not a borrower when interest is payable in kind and not in cash. There is nothing in the definition of a "loan" to suggest that it does not include a transaction in which interest is payable in kind. In view of the definition of a "loan" in sub-s. 2 (12) I have no doubt that the petitioners are borrowers within the meaning of S. 38. The rule is accordingly made absolute, the order of the learned Subordinate Judge is set aside and I direct that he do hear and determine the application in accordance with law. The costs in this rule will be costs in the application—hearing fee, one gold mohur.

R. C. MITTER AND MOHD. AKRAM JJ.

Birbhadra Chandra v. Surendra Prasad Lahiri

Appeal No. 199 of 1941, D/- 28-3-1944.

Bengal Money-Lenders Act (10 of 1940), S. 36 (1) Proviso (i) — Effect of—Where agreement cannot be re-opened by reason of proviso (i) to S. 36 (1) of Act, amount treated as principal of loan by parties in that agreement must be taken to be principal of loan and not amount actually advanced. [P 304 C 2]

JUDGMENT.—This appeal which is by the debtor, arises out of an application made by him under S. 38, Bengal Money-Lenders Act (10 of 1940). The facts, which are not in controversy, are the following. On 27th October 1897, the appellant's grandmother Bama Sundari Debi, as executrix to the estate of the appellant's father borrowed from the respondent's predecessor-in-interest Swarnamoyee Debi Rs. 5000 on a simple money bond (Ex. A-3) with a stipulation to pay simple interest at the rate of Rs. 7-8-0 per annum. On 1st October 1904 the appellant executed a renewed bond (Ex. A-2) for Rs. 7000 in favour of the said Swarnamoyee Debi at the same rate of interest. The said sum of Rs. 7000 was made up of Rs. 5000 the original loan and of Rs. 2000 which represented the arrears of interest on the same due at the date of the renewed bond. On 25th September 1911 the appellant executed the bond Ex. A, in favour of the creditor, Swarnamoyee, for Rs. 14,000. The said sum was made up of Rs. 10,264-12-9, which represented the principal and arrears of interest due on the previously renewed bond Ex. A-2, and a sum of Rs. 3735-3-3 advanced in cash on that date. Simple interest at the rate of Rs. 7-8-0 was also payable on this bond. Interest payable in terms of this bond up to 25th June 1919 amounting to Rs. 8137-8-0 was paid on or before that date. On that date the sum of Rs. 14,000 which was treated as the principal in the bond Ex. A was only due. For securing the said sum of Rs. 14,000 the appellant executed the mortgage bond (Ex. A) in favour of the creditor Swarnamoyee on 25th June 1919. The document (Ex. A) recited that Rs. 14,000 was payable by the debtor on that date after adjustment. That amount was treated as principal payable with interest at 6 per cent. per annum (compound) with yearly rests. The appellant has applied under S. 38 of the Act to the Court for taking account in respect of the loan secured by this mortgage.

From the aforesaid facts it is clear that the sum actually advanced by way of loan was Rs. 8735-3-3 (namely, Rs. 5000 advanced on 27th October 1897, and

Rs. 3735-3-3 advanced on 25th September 1911). It is admitted that all these years from 1897 till the application the total amount paid by the borrower is Rs. 27,000 odd. As that amount is more than double the actual advance the appellant wanted the Court to declare that nothing was payable on the mortgage bond (Ex. A) which he had executed on 25th June 1919 to secure the sum of Rs. 14,000. The learned Subordinate Judge did not accept the appellant's contention. He held that the amount mentioned in the mortgage bond as principal, namely Rs. 14,000 has to be taken as principal for the purpose of taking accounts under S. 38 of the Act. Proceeding on that footing he found that Rs. 8686-0-5 was still due to the creditor on that bond at the date of the application. He relied upon proviso (i) to S. 36 (1) of the Act, to support his conclusion that Rs. 14,000 is to be treated as the principal of the loan. In taking accounts he started from the mortgage bond Ex. A, took into account all payments made since the date of that mortgage bond but refused to take into account payments made before the said date. Calculating interest in terms of S. 30 of the Act, from the date of the said mortgage bond—Ex. A—and taking into account payments made since that date he came to the finding that Rs. 8407-3-11 was due on account of principal and Rs. 278-12-6 as interest—total Rs. 8686-0-5. Against his order the debtor has filed this appeal and on his behalf two points have been urged :

(i) that the learned Judge ought to have taken Rupees 8735-3-3 as the principal of the loan, that being the sum which was actually advanced by the creditor, and (ii) in case Rs. 14,000 be taken to be the principal of the loan the lender was not entitled to recover interest on that amount from the date of the mortgage bond. If the first contention be not accepted but the second is, nothing would be due to the creditor at the date of the application, as the sum of Rs. 18,114-12-4 had been paid by the debtor to the creditor between the date of the mortgage bond (25th June 1919), and the date of the application. Section 2 (16), Bengal Money-lenders Act (10 of 1940), defines the term 'principal of a loan.' Unless there is anything repugnant in the subject or context it means the amount actually advanced to the borrower. Where however an agreement cannot be re-opened by reason of proviso (i) to S. 36 (1) of the Act, the amount treated as principal of the loan by the parties in that agreement must be taken to be the principal of the loan. This is the effect of our judgment in 47 C. W. N. 578.¹ No convincing argument has been advanced by the appellant's advocate which would induce us to revise the opinion which we have expressed in that case. The question therefore is whether that proviso is attracted in a proceeding under S. 38 of the Act. It is, therefore, necessary to examine the scope of that section.

The section entitles the borrower to make an application to the Court, which would have jurisdiction to entertain a suit for the recovery of the loan, to take accounts and to declare the amount that was payable and already due to the lender or the amount that was payable but not yet due. The declaration made by the Court on such an application would have the force of a decree and so would be res judicata in a subsequent suit instituted by the lender for recovery of the loan or in the case of a secured loan, in a subsequent suit for redemption. In taking accounts in a proceeding under S. 38 of the Act the Judge is not to act as mere accountant but he has to examine the transaction and to allow in the accounts only such amounts as are allowable to the lender under the provisions of the Act. The Judge is required to exercise the powers given by the Act which are intended for the relief for borrowers. All these are indicated by sub-s. (2) of S. 38. The Court is required to apply the provisions of Chaps. 4, 6 and 7 so far as they may be applicable. On an examination of the provisions of those chapters it is obvious that many

1. ('44) 31 A. I. R. 1944 Cal. 113 : 47 C. W. N. 578, Nripendra Chandra v. Md. Abbas Ali.

of the sections contained in those chapters by their very nature would not be applicable to a proceeding under S. 38, for they have no bearing on the enquiry which is for the purpose of declaring what is payable or due to the lender on the accounts. For instance, of the four sections which constitute Chap. 4, Ss. 24 to 26, would not be relevant to that enquiry. Section 27 is the only provision in that chapter which has any bearing on the question of accounts and by including Chap. 4 in sub-s. (2) of S. 38 the Legislature intended the Court to do in an application made by a debtor under S. 38 of the Act, what the Court is required to do in a suit filed by the creditor to recover his dues, or in a suit for redemption, to which the Act applies. In connexion with an application under S. 38 the words "application under S. 38" must accordingly be read in place of the words "suit to which the Act applies" occurring in para. 1 of Section 27.

We need not examine the provisions of Chap. 6 in detail. In taking accounts under S. 38 the Court would have to apply the provisions of Ss. 30, 32 and 33. Of the provisions of Chap. 7, Ss. 34, 35 and 37 would not by their very nature come into the picture in a proceeding under S. 38. They relate exclusively to suits for recovery of the loan. Section 39 deals with deposits in Court by the borrower and S. 40 with wrong entries in bonds, etc. That section and the succeeding two sections deal with penalties and so would not be material in an investigation into accounts under S. 38. Sections 43 and 44 also would not be material for that purpose. The only section of Chap. 7 which thus remains is S. 36. By mentioning Chap. 7 in S. 38 (2) the Legislature therefore had in mind the provisions of that section only. Accordingly the intention of the Legislature is that in taking accounts under S. 38 the Court is to exercise exactly the same powers conferred on it, which it is required to exercise in a suit instituted to which the Act applies, that is, in a suit for recovery of the loan or a suit for redemption in the case of a mortgage pending on or instituted after 1st January 1939 or in a suit instituted by the borrower for relief under S. 36. Those powers are defined in cls. (a) to (e) of sub-s. (1) of S. 36. The two provisos to that sub-section cannot be ignored for they exactly define the powers conferred by cls. (a) and (b) of that sub-section.

In this view of the matter in exercising the powers given under S. 36 (1) when dealing with an application under S. 38 the Court is to regard that application as if it was a suit of the nature mentioned in para. 1 of S. 36 (1) of the Act. If therefore an adjustment or agreement could not have reopened by reason of proviso (i) to S. 36 (1) in a suit of the nature mentioned in para. 1 of S. 36 (1), if that suit had been instituted on the date on which the application under S. 38 had been filed, that adjustment or agreement cannot be reopened in an investigation under S. 38. This is our construction of the last part of sub-s. (2) of S. 38. This construction of ours is fortified by the fact that any other view would lead to inconsistent results, for if proviso (i) be held inapplicable to a proceeding under S. 38, an adjustment or agreement more than twelve years old would be liable to be reopened in taking accounts, and that proviso being applicable to a suit for recovery of the loan, that very adjustment or agreement could not be reopened in determining the dues of the lender. If such a suit and an application under S. 38 be pending at the same time, the lender would be entitled to get by the decree of the same Court different amounts in respect of the same loan according to the respective dates of the disposal of the application and the suit. If the suit is disposed of before the application the lender may get a decree for a sum larger than what would have been determined on the application under S. 38 and in such a case, where the suit is disposed of before the application, the application would become infructuous. If, however, the application be disposed of before the suit, the lender may get a decree for a lesser amount than he would be entitled to in view of the said proviso

for the declaration of amount payable and due made under S. 38 (2) would operate as *res judicata* in the suit by reason of S. 38 (3).

We accordingly hold that the mortgage transaction in question cannot be reopened, as it could not have been reopened by the Court in view of proviso (i) to S. 36 (1) in a suit to enforce the loan instituted by the lender on the date when the application was made by the defendant under S. 38 or in a suit by the borrower for relief under S. 36 instituted on that date. The agreement in the mortgage by which the parties treated Rs. 14,000 to be the principal of the loan cannot therefore be touched in these proceedings. That amount, and not what was actually advanced by the lender to the borrower before the said mortgage instrument, must be treated as the principal of the loan. The second contention has been urged by the appellant's advocate in the following manner. He says that if the mortgage instrument (Ex. A) so far as it relates to Rs. 14,000 cannot be touched by reason of proviso (i) of S. 36 (1) the mortgagor would be under the liability to pay the said amount to the mortgagee on the basis of the promise to pay the same contained in the mortgage instrument. But that in applying S. 30 the principal of the loan must be taken to be the actual advance, which in this case amounted to Rs. 8735-3-3. As the creditor, says he, can get in all interest equal to that amount, and as Rs. 8930-0-0 had already been paid by his client towards interest before 25th June 1919 when mortgage was executed, no further interest was payable.

But as adjustment recited in the mortgage instrument and the agreement embodied therein, by which the parties thereto took Rs. 14,000 to be the principal of the loan, cannot be touched, the sum of Rs. 14,000 has to be treated as the principal of the loan for all purposes, and in terms of S. 30 interest would be payable upon the said sum, so long as the interest paid by the debtor after the execution of that mortgage bond did not exceed the sum of Rs. 14,000. As Rs. 18,114-12-4 had been paid by the borrower after the execution of the mortgage (Ex. A) the declaration made by the learned Subordinate Judge that a sum of Rupees 8686-0-5 (which is made up of Rs. 8407-3-11 being the balance of the principal and Rs. 278-12-6 being the arrears of interest, calculated at 8 per cent. simple) was due and payable at the date of the application is correct for that amount added to Rs. 18114-12-4 is less than Rs. 28,000 which is double or what is to be taken as the principal of the loan. Both the contentions urged by the appellant's advocate are accordingly overruled and the appeal is dismissed with costs. Hearing fee three gold mohurs.

McNAIR J.

Bengal Jute Mills v. Jewraj Heeralal.

Application, D/- 2-3-1943.

(a) Arbitration Act (1940), S. 31 — Scope — S. 31 is not enabling section, but section which merely defines jurisdiction. [P 305 C 1]

(b) Arbitration Act (1940), Ss. 14, 31 — Award not filed—Application to set aside award cannot be entertained. [P 305 C 1]

(c) Arbitration Act (1940), S. 32 — Procedure—Distinction between present and prior Acts pointed. [P 305 C 1]

JUDGMENT. — This is an application for setting aside an award. The award in question was made on 19th May 1942, and the application to set aside that award was made on 1st August 1942. A preliminary point has been taken on behalf of the respondents to the effect that the application is misconceived because the award has not been filed and is not before the Court. The question now before me was raised in the Bombay High Court in *I. L. R. (1942) Bom. 452*.¹ The head-note of that case is as follows :

1. ('42) 29 A.I.R. 1942 Bom. 101 : I.L.R. (1942) Bom. 452, *Ratanji Virpal v. Dhirajlal Manilal*.

"Under the Arbitration Act, 1940, till the award has been filed in Court, it is not competent to a party to an arbitration to file a petition to set aside the award. In cases where it is necessary to have the validity of an award ascertained and the award has not been filed in Court it is open to a party to the arbitration to proceed under S. 14 (2), Arbitration Act, to have the award filed in Court." It is clear that under the Arbitration Act of 1940 the validity of an arbitration agreement or an award can only be challenged by means of an application. Under the previous Act it was considered possible to challenge the validity of an award by means of a suit. Section 32 of the 1940 Act provides that no suit shall lie for the challenging of an arbitration agreement or an award.

There is no doubt that the award in the present application has not been filed and it is contended that the award cannot now be filed owing to the amended Arts. 158 and 178, Limitation Act. Article 178 provides a period of 90 days from the date of service of notice of the making of the award within which an application may be made for the filing in Court of the award. Article 158 provides that an application to set aside an award must be made within 30 days of the date of service of the notice of the filing of the award. The award has been made, and the notice of the making of the award was served on or about 19th May 1942. 90 days have elapsed since the date of service of the notice, and it is argued that under Art. 178 no application can now be made for the filing of the award. It follows that no application can now be made to set aside the award. It is pointed out, however, that the arbitrators have the power to file the award by forwarding it under a sealed cover to the Registrar with a letter of request that the award be filed. This is provided under R. 13 of the Rules of the Original Side of this Court made under S. 44, Arbitration Act. Learned counsel on behalf of the petitioner argues that the Court has power under S. 31, Arbitration Act, to set aside the award. Section 31 (2) provides, so far as is material, that all questions regarding the validity, effect or existence of an award shall be decided by the Court in which the award has been or may be filed and by no other Court. Stress is laid on the words "may be filed" and it is argued that the arbitrators still have the power to file the award without making any substantive application. In my opinion S. 31 is not an enabling section, but a section which merely defines the jurisdiction. The marginal note refers to jurisdiction and the entire S. 31, including sub-s. (2) defines the particular Court or Courts which may deal with questions regarding the validity, effect or existence of an award, that is to say, this Court is given jurisdiction to deal with those questions because this Court is a Court in which the award may be filed.

The scheme of the Act appears to me to contemplate the consideration of an award by the Court only when the award has actually been filed in Court. Section 14 provides in sub-s. (1) that when the arbitrators or umpires have made their award, they shall sign it and give notice in writing to the parties. Sub-section (2) provides that they shall, at the request of the parties or if so directed by the Court upon payment of fees and costs, cause the award to be filed in Court. Section 14 (2) then provides: "and the Court shall thereupon give notice to the parties of the filing of the award." Those words appear to me to be important as indicating that it is only when the award has been filed in Court that the Court takes seizin of the award and informs the parties that it is prepared to consider any questions connected with the award.

It must be remembered that arbitration proceedings are proceedings whereby the parties select their own tribunal. The Court may, on application, interfere in the course of arbitration proceedings within the limits prescribed by the Legislature, but the award is the decision of the tribunal which the parties themselves have selected and until it is filed in Court the intention of the Legislature appears to be that the Court should not interfere. Once the award has been made, it may

be impossible or difficult to enforce its terms or correct injustice and it is then that the award is filed in Court in order to enable the parties to obtain satisfaction through the machinery of the Court. The question has been considered in some detail by the Bombay High Court in the case to which I have already referred. There the learned Judge held that it is not competent to apply to set aside an award till the award has been filed. On a consideration of the scheme of the Arbitration Act I have arrived at the same conclusion and this application must be dismissed with costs.

HENDERSON J.

Mohendra Nath Haldar v. Mohendra Nath Sardar.

Appeal No. 505 of 1943, D/- 8-5-1944.

(a) Record of Rights—Correctness—Presumption of — Admission by mortgagor in mortgage deed that tenure is mukarari does not rebut presumption.

[P 306 C 1]

(b) Bengal Tenancy Act (1882, as amended in 1940), S. 26G—Sub-ss. (1) and (8) are not repugnant.

[P 306 C 1]

(c) Bengal Tenancy Act (1882, as amended in 1940), S. 26G (8) — Applicability—Sub-s. (8) only applies to mortgages subsisting on the date of the commencement of the Bengal Tenancy (Amendment) Act of 1940 and not to mortgages extinguished in the year 1938.

[P 306 C 1]

(d) Landlord and tenant — Estoppel — Subsequent termination of landlord's title can be pleaded.

[P 306 C 2]

(e) Bengal Tenancy Act (8 of 1882, as amended in 1940), S. 26G (1a)—Mortgage with conditional sale by two mortgagors—One accepting lease from mortgagee —Plea can be raised by tenant mortgagor in rent suit that mortgagee's title is extinguished under S. 26G (1a) even though co-mortgagor is no party. [P 306 C 2]

JUDGMENT.—This appeal is by the defendant and it raises a point under S. 26G, Ben. Ten. Act. The defendant and his cosharer executed a mortgage by conditional sale in favour of the plaintiffs and put them into possession on 4th April 1923. The appellant took a sub-tenancy under the plaintiffs on 26th April 1926, on an annual rent of Rs. 117. The present suit is to recover rent for the years 1343 to 1346. The appellant's contention is that the plaintiffs cannot recover rent for the years 1345 and 1346 as their interest terminated at the end of 1344 under the provisions of S. 26G. The learned Munsif gave effect to this contention but his decision was overruled by the learned Subordinate Judge in the lower appellate Court. There was a dispute whether the interest of the mortgagors was that of occupancy raiyats or raiyats holding at fixed rates. The learned Subordinate Judge held that the appellant was estopped from pleading that it is the former in view of the fact that it is mentioned as mokurari in the mortgage deed. This is not a sufficient ground for estoppel. It must further be proved that the respondents were misled and that apart from this deception they would not have advanced the money. Mr. Das drew my attention to the fact that such a case was raised in ground No. 3 in the grounds of appeal in the lower appellate Court. This is perfectly true; but there is no evidence upon which such a plea can be supported. Neither was there a case for taking further evidence under the provisions of O. 41, R. 27, Civil P. C. As there are no materials on the record on which a plea of estoppel could be supported it must be overruled. Turning to the merits of the question I find that the learned Munsif did not discuss it. This certainly looks as though the plaintiffs did not press it in his Court. The learned Subordinate Judge merely asserts that the land is mokarari; but as he was of opinion that the appellant was prohibited from raising the point he gives no reason for this assertion and does not discuss the evidence.

I am not however, prepared to remand the appeal merely for a rehearing on this point. The finally pub-

lished record of rights supports the appellant. The plaintiffs made no attempt to show aliunde that the holding is mokarari. They relied solely on the admission made by the mortgagors in the mortgage deed and in another document. It is a matter of common experience that statements of this kind are frequently made collusively in documents under the idea that they create evidence against the landlord. In the absence of papers from the landlord's office it would be unreasonable to hold that the presumption has been rebutted. I, therefore, find that the interest of the mortgagors is that of occupancy raiyats. The mortgage bond comes within the terms of S. 26G (1a). It was entered into before the Bengal Tenancy (Amendment) Act of 1928 commenced and was subsisting on and after 1st August 1937. It must therefore be deemed to have taken effect as a complete usufructuary mortgage for 15 years, and under sub-s. (5) it should be deemed to have been extinguished at the end of 1344 when the mortgagors became entitled to recover possession. Mr. Das contended that that section does not apply for two reasons: (1) that the decision of a Division Bench of this Court in 47 C. W. N. 791,¹ is to this effect. (2) That as these provisions are quite inconsistent with those of sub-s. 8 (b) it must be held that they have no effect. On the first point I need only say that the decision is against the respondents. The learned Judges were of opinion that the benefits of S. 26G are available to mortgagors in the position of the appellant but that they are not entitled to recover possession by a mere application under sub-s. (5). The decision by the same Bench in 47 C. W. N. 789,² which was heard a few days earlier, is to the same effect. The second argument based on an alleged repugnancy is raised as follows: Under sub-s. (1a) the mortgage was extinguished at the end of the year 1344. Under sub-s. 8 (b) the mortgagee may institute a suit for a declaration that the original principal with interest has not been extinguished by the profits arising from the land during the period. These provisions are mutually exclusive and the former must be ignored.

It would be difficult to find any principle of interpretation under which this part of the section can be ignored altogether. The first question for consideration is whether a repugnancy can be avoided. In my judgment it can on account of the use of the words "deemed to have been extinguished." The extinction is a pure legal fiction in defiance of the actual agreement between the parties. Under sub-s. 8 (b) the mortgagee is given an opportunity to show that in fact it has not been so extinguished. This of course would be an impossible task in the absence of some criterion either in the mortgage bond or in the Act itself. Under sub-s. (9) it is provided that in making this calculations the mortgagee should be allowed simple interest at 8 per cent. I am therefore of opinion that both parts of the section may be given effect to without a repugnancy.

This construction, however, will not afford the plaintiffs any relief in the present suit. In the first place sub-s. (8) only applies to mortgages subsisting on the date of the commencement of the Bengal Tenancy (Amendment) Act of 1940. The present mortgage was extinguished in the year 1938. Then in the second place the mortgage will be extinguished unless the mortgagee takes action under the sub-section. He cannot get any relief by merely going to sleep. If the benefits of the sub-section had been available to the plaintiffs they should have instituted the suit referred to therein as soon as the written statement was filed. No doubt that suit could have been tried jointly with the present rent suit; but at any rate until the plaintiffs obtained a declaration in a properly framed suit, they would have no foundation on which to build their objection to the appellant's claim. It remains to refer to one other matter mentioned by

the learned Subordinate Judge. He held that it was not open to the appellant to raise this defence in a rent suit. It was contended by Mr. Das that this view is correct. It is not very clear from the judgment on what grounds the learned Subordinate Judge took this view. He does not appear to have relied upon an estoppel. Though the appellant would be estopped from denying that the plaintiffs had any title when the lease was granted he is entitled to show that their title has subsequently terminated. It appears, however, that the learned Subordinate Judge thought that the question could not be determined in the absence of the appellant's co-mortgagor. It is perfectly true that he could not be made a party to the present suit and that he will not be bound by the decree. He will certainly be at liberty, if he likes to say that the mortgage has not been extinguished and to allow the plaintiffs to remain in joint possession with the appellant. But that is no reason why the appellant should be prohibited from resisting a claim for rent by showing that the relationship of landlord and tenant no longer exists. Mr. Das suggested an analogy with the case of disputes about the rate of rent and similar matters. It is perfectly true that one tenant cannot raise a dispute about matters pertaining to his tenancy in the absence of his co-tenants. But there is no analogy between disputes between a landlord and a tenant and disputes between a mortgagor and a mortgagee. I am therefore of opinion that the learned Subordinate Judge was not right when he held that it was not open to the appellant to raise this defence. The decree will accordingly be modified. The plaintiffs' claim for rent for the years 1345-1346 is dismissed. The plaintiffs will get half their costs in the first Court and in the lower appellate Court. They will, however, pay the appellant's costs in this Court. The rule is entirely misconceived and is discharged. Leave to appeal under Cl. 15, Letters Patent, is granted.

EDGLEY AND BLANK JJ.

Emperor v. Muktar Ali.

Reference No. 8 of 1943 and Cri. Appeal No. 171 of 1943, D/- 9-6-1943.

(a) Criminal P. C. (1898), S. 307 (2) — Reference can be made of case of one accused only — But piecemeal reference of case of such accused is not permissible — High Court has to consider entire evidence and give weight to opinion of Judge and verdict of jury.

[P 307 C 2]

(b) Criminal Trial — Prosecution omitting to examine particular witnesses — Inference is that they do not support prosecution.

[P 307 C 2; P 308 C 1]

BLANK J. — The facts from which the present reference and appeal arise are stated conveniently in the following extract from the letter of reference :

"The prosecution case is that on the afternoon of Thursday, the 30th April last, four persons, viz., Hatem, Arshed, Abdul Aziz and Safiladdi were coming to Jaliaghata from Mithapur. When they came to the south-west of the house of one Kashem, in Jaliaghata, a party of armed men headed by one Seru attacked them. Arshed and Abdul Aziz fled into the house of Kasem unscathed. Hatem, Safiladdi and his brother Paban who came to their rescue, were injured with lejas. The injured men ran inside Kasem's house and took shelter in his hut. Hatem fell down on the door leading to the hatina of the hut. They were chased by the assailants. Hatem's mother came there running from her house which is close by and lamented over her son. Seru hurled a leja which struck Hatem's mother Jarina Bibi. She at once fell dead there. The accused pleaded not guilty. They suggested a different version of the occurrence at a different place. They further suggested that Paban killed Jarina Bibi with leja."

Fourteen accused were convicted under S. 148, Penal Code, on an 8 to 1 verdict. With regard to the charge under Ss. 149 and 302, Penal Code, the jury returned a unanimous verdict of not guilty in favour of 5 accused and a verdict of guilty, by 5 to 4, in respect of the remaining 9 accused whose cases have been referred by

1. ('43) 30 A.I.R. 1943 Cal. 590 : 47 C. W. N. 791, Saha-raddin v. Altafuddin.

2. ('43) 30 A.I.R. 1943 Cal. 588 : 47 C. W. N. 789, Manomohan Das v. Parswanath Das.

the learned Additional Sessions Judge. The learned Additional Sessions Judge agreed with the whole of the verdict of the jury except the majority verdict of guilty under Ss. 149 and 302. His reasons for reference were that this part of the verdict was based on misappreciation of evidence, there being no grounds for discrimination as between the five accused unanimously found not guilty and the nine accused found guilty by a majority verdict of 5 to 4; further that certain witnesses for the prosecution had been withheld whose evidence was so material that the jury ought to have presumed against the prosecution. The appeal is on behalf of the fourteen accused who were convicted under S. 148, Penal Code, and sentenced to rigorous imprisonment for one year each except in the case of 3 persons who were given the benefit of S. 562, Criminal P. C. When the hearing opened a preliminary objection was taken on behalf of the Crown. Section 307 (2), Criminal P. C., runs: "Whenever the Judge submits a case under this section he shall not record judgment of acquittal or of conviction on any of the charges on which such accused has been tried. . . ." The words "such accused" refer to the words "any accused person" in sub-s. (1); these words in both sub-sections were inserted by the amending Act of 1923 to remove doubts, which had arisen from certain decisions, whether it was competent to a Sessions Judge to refer the case of one or some only of a number of accused persons. On the statute as it now stands, the present reference evidently cannot be attacked on the ground that the reference ought to have been made in respect of all the accused persons and of all the charges. We make these observations as the Crown first submitted that the reference was bad for the reason just stated. This submission was sought to be supported by the observations of Lord-Williams J. in 37 C.W.N. 1180.¹ Apart, however, from the consideration that the observations of the learned Judge are not part of the findings of the Court it is clear from the text of those observations that the headnote does not represent them with complete accuracy; in particular para. 3 of the decision appearing at page 1184, may be referred to.

An objection of some substance is however that the reference in its present form is incompetent. It will be observed that the 9 persons whose cases are now referred were among the 14 convicted under S. 148. For the Crown the case in 25 C. W. N. 682,² was referred to. This decision was before the 1923 amendments but its authority is not affected thereby as the defects in the order of reference were different from those in the present order and the case remains an authority for the proposition that "only where the Sessions Court has made a proper reference will the High Court deal with the matter." In that case, however, the defects were remediable and this Court sent the reference back for the defects to be remedied and afterwards dealt with the reference in due course. The difficulty arising from the terms of the statute as it now stands was not in issue in that case and we are unable to treat it as an authority governing the present reference. The learned advocate for the Crown referred to the judgment of the Court in 37 C. W. N. 1180.¹ In that case the Court rejected the reference firstly on the ground that the learned Sessions Judge had acted illegally in making a reference after recording an order in respect of other charges against the accused person. We observe, however, that two of the learned Judges explicitly considered the evidence and rejected the reference also on the merits. The remarks of the third Judge at p. 1185 of the Report are consistent equally with the view that he did the same as with the view that he considered the legal objection fatal. We hesitate to hold that two at least of the three learned Judges who decided that case considered the legal objection taken by itself was

1. ('33) 20 A.I.R. 1933 Cal. 665 : 37 C. W. N. 1180 (S.B.), Emperor v. Bishnu Charan.

2. ('21) 8 A.I.R. 1921 Cal. 252 : 25 C. W. N. 682, Emperor v. Taribulla.

necessarily fatal to the reference. We have also had our attention directed to an unreported decision, Ref. No. 24 of 1933, *Emperor v. Pocha Mondal*, in which Mukherji and Bartley JJ., observed :

"At the outset it may be pointed out that a reference of this description is not quite in order. It has been pointed out by this Court that when a learned Sessions Judge makes a reference under S. 307, Criminal P. C., in respect of an accused person the whole case, in so far as that particular accused is concerned, must be left open for the consideration of this Court on such reference. Piecemeal references of this description have been always condemned by this Court inasmuch as they place this Court in a very embarrassing position. We have however gone through the letter of reference of the learned Judge and his charge to the jury and have also heard the learned Deputy Legal Remembrancer who has placed the facts and circumstances of the case. Having done so we have come to the conclusion that so far as this particular case is concerned the defect in the reference need not deter us from dealing with the matter which has been sent up to us for our consideration." In this instance the reference was accepted. We also note that in 52 All. 881³ a Division Bench of the Allahabad High Court dealt with a case in which the error now under consideration had been made by setting aside the conviction and sentences passed by the Sessions Judge and substituting a conviction and sentence by the High Court. On the foregoing considerations we proceed to deal with the present reference. We are to consider the entire evidence and to give due weight to the opinions of the Sessions Judge and the jury. The learned advocate appearing in support of the reference has taken us through the evidence of P. Ws. 2 to 8, the eye witnesses, and submits that with reference to the charge under Ss. 302 and 149, Penal Code, the evidence against all the accused persons is generally to the same effect. The learned advocate for the Crown conceded that it was difficult to discriminate between the cases of the 9 now referred and the remaining 5. He referred to the abstract of the evidence as against individuals appearing at p. 43 of the Paper Book and suggested that the jury might have discriminated on the basis that the accused whom the witnesses spoke of as carrying weapons were guilty under Ss. 302 and 149, Penal Code whereas the others were not guilty. The suggested explanation however fails to account for the instances of accused Akkel Ali and Tazem alias Kottia, who were found not guilty by the jury although the evidence is that 4 witnesses in the former case and 5 in the latter say that the accused had a leja in hand. In our view the first reason for the reference propounded by the learned Judge is sound and must prevail.

The remaining reason is based on the fact that two witnesses one Saburjan, wife of Kasem, and the other Golbaru, the daughter of the deceased woman and the wife of Safiladdi, P. W. 6, were withheld by the prosecution. The evidence shows that they were in Kasem's house at the time of the occurrence and that their statements to the police were recorded under S. 161, Criminal P. C. The learned Judge states in the letter of reference that the jury should have drawn a presumption under S. 114, Illus. (g), Evidence Act, in respect of the occurrence inside Kasem's house when these two material witnesses were not examined. This topic was dealt with by the learned Judge towards the close of his charge at p. 46, lines 5 to 25 of the Paper Book. The learned Judge has perhaps rather under-emphasised the importance, on the facts of the present case, of the omission to examine these two women. We do not think he would have been exceeding his duty had he put it pointedly to the jury that the omission to examine them, in the particular circumstances, raised serious doubts of the good faith of the prosecution evidence relating to the occurrence inside Kasem's house. Be that as it may, the jury could, and in our opinion should, have noted that potential witnesses of

3. ('30) 17 A.I.R. 1930 All. 489 : 52 All. 881, Emperor v. Nawal Behari.

comparable authority to those examined were not examined and could and should have inferred thence in the circumstances of the case that if they had been witnesses they would not have supported the prosecution case. In our opinion, therefore, this ground is also a good ground for supporting the reference.

It remains to consider the appeal. Here we have only to see that the jury were properly charged with this part of the case and that their verdict is not perverse. The learned advocate for the appellants has taken us through the evidence separately so far as it relates to this part of the case. He submits that the defence case was not put before the jury. That is to be found at the end of the cross-examination of P. W. 1. Cross-examination on the point is found, for example, at p. 9, lines 58 to 62 of the same and our attention has also been drawn to the passages at p. 11, lines 45 to 53, p. 12 lines 48 to 51 and similar passages at pages 14 and 15 of the Paper Book. The defence case, as it appears on the evidence, is that the occurrence took place on Adam Ali's plot (p. 8 of the Paper Book) and that the prosecution shifted the place of occurrence to suit their case. We find however that the matter was put before the jury clearly and in sufficient detail at p. 44, lines 51 to 57 of the Paper Book and we concur generally in the submission of the learned advocate for the Crown that the offence under S. 148, Penal Code, has been abundantly proved unless all the prosecution witnesses are lying. In this view we hold that the appeal is without merits and should be dismissed. We, therefore, accept the reference and acquit the 9 persons whose cases have been referred of the charges under Ss. 149 and 302, Penal Code. We dismiss the appeal and maintain the conviction and sentences under S. 148, Penal Code passed on the appellants, other than those who had been given the benefit of S. 562, Criminal P. C., who will now surrender to their bail, if on bail, and serve the remainder of their sentences.

EDGLEY J.—I agree.

DERBYSHIRE C. J. AND GENTLE J.

Estate of Harendra Kumar v. I. T. Commissioner, Bengal.

Reference No. 5 of 1942, D/- 18-6-1943.

(a) Income-tax Act (1922), S. 41 (1)—Assessment of trust property — Income of trust from investments, from immovable property and from business — Whole income from all sources is to be computed.

[P 309 C 1]

(b) Income-tax Act (1922), S. 25A (3)—Applicability — Property not of joint family but trust property — Some beneficiaries members of Hindu family—Assessment is not to be made as undivided Hindu family.

[P 309 C 2]

(c) Income-tax Act (1922), S. 41 (1)—Trust property, investments and business settled in trust—Trustee to recover all income and distribute—Assessment of all income and maximum rate held correctly levied.

[P 309 C 2]

GENTLE J. — This reference arises out of a deed creating a trust which was executed by the late Rai Harendra Kumar Roy Choudhury Bahadur on 3rd September 1930. By the deed of trust the settlor granted, conveyed, assigned and transferred unto the trustees several lands and other immovable property, mortgages of which he was the grantee, securities and investments and the goodwill of the settlor's banking and money-lending business as a going concern together with its assets, outstandings and liabilities. The properties are specified in Schs. A, B, C and D and their value is expressed to be about rupees nineteen lacs. The first trustee was the settlor himself and upon his death or retirement his son Ganendra Kumar Rai Choudhury should become the trustee and upon his death or retirement the grandsons of the settlor indicated in the instrument. The son, Ganendra Kumar Rai Choudhury, is the present trustee. The deed directed the trustee to collect the income from all the trust properties and out

of the income: he should pay the costs and charges of carrying on the business and realising the income and outstandings; carry out the worship of the family deities in the same manner as the settlor had done up to the execution of the deed; maintain some specified educational institutions and a hostel on the same scale as the settlor; pay to charities (which are not described or indicated) up to the amounts stated; pay the expenses of pilgrimages of members of the family on such scale and at such times as the trustee in his discretion should think proper; and, lastly, pay the cost of maintenance and medical attendance and treatment of the settlor, his son, his grandsons and great grandsons and members of their respective families including their mothers, wives and children and also the customary social ceremonies of any of them, the scale of expenditure being such as the trustee in his discretion should consider proper. Further the settlor's wife was to have the right of residence in the settlor's houses; his daughters should be at liberty to reside in the houses as long as their mother should live there. One daughter, named in the deed, was to receive Rs. 25 per month so long as she lived away from her mother during the latter's lifetime and from the rest of the family after her mother's death. A daughter-in-law, the widow of a predeceased son of the settlor, was to receive Rs. 25 per month and the son was to be paid Rs. 100 monthly whilst he acted as trustee.

The trust was to continue for 25 years from its creation and at the conclusion of that period the corpus of the trust property should devolve upon the settlor, if he were still alive, and if he had died meanwhile it would devolve upon the settlor's sons, grandsons and great grandsons as indicated in the deed. The settlor died in the year 1936. Until the income-tax year 1939-1940 two assessments were made upon the income, one in respect of the profits from the business, which was in the hands of the trustee, and the other in respect of the income from the other sources and investments which also were in the hands of the trustee. The first assessment was made upon the trustee as an individual and the second upon a Hindu undivided family. In the year 1940-41 all the income of the trust was included in one assessment and tax was levied at the maximum rate. This reference concerns the last assessment and the points for decision are whether the inclusion of the whole of the trust income in one assessment is correct and also whether this income is subject to tax at the maximum rate. All the properties in the hands of the trustee are trust properties and the trustee, as such, carries on the business, and collects the profits from it together with the income from the various investments. The several properties, including the business, from which income is derived are not joint family properties nor properties belonging to a Hindu undivided family but they are trust properties belonging to the trust. The cestui que trusts are not only the members of the settlor's family, that is to say a Hindu family which may or may not be undivided, but the beneficiaries include a school and a hostel and, in addition, some undetermined and unspecified charities. Except for the sum of Rs. 25 payable monthly to a daughter-in-law, a like sum payable to a daughter upon certain contingencies and the sum of Rs. 100 per mensem which the present trustee, the son of the settlor, is entitled to receive whilst he acts as trustee, substantially all payments are to be made at the discretion of the trustee with the exception that in regard to the carrying out of the worship of the family deities and the maintenance of the educational establishment and the hostel, which are to be carried out in the same manner and on the same scale as had been the settlor's custom. It is quite clear that the substantial payments, out of the income, which the trustee has to make are matters entirely in his discretion and his decision. Incidentally, the sum of Rs. 100 monthly which the present trustee is entitled to receive whilst acting as trustee, is not the sole benefit which he can demand under the

trust. He is also entitled to be paid such sums in respect of his own maintenance, medical expenses and the like as in his own discretion he may determine. In these circumstances in my view the interests of the cestui que trusts are indeterminate. It is now convenient to refer to S. 41 (1), Income-tax Act, the material portions of which are as follows :

"In the case of income, profits or gains chargeable under this Act which . . . any trustee or trustees appointed under a trust declared by a duly executed instrument in writing whether testamentary or otherwise . . . are entitled to receive on behalf of any person, the tax shall be levied upon and recoverable from such . . . trustee or trustees in the like manner and to the same amount as would be leviable upon and recoverable from the person on whose behalf such income, profits or gains are receivable and all the provisions of this Act shall apply accordingly : Provided that where any such income, profits or gains or any part thereof are not specifically receivable on behalf of any one person or where the individual shares of the persons on whose behalf they are receivable are indeterminate or unknown, the tax shall be levied and recoverable at the maximum rate." The learned advocate on behalf of the respondent has contended that, in so far as the present reference is concerned, since the income, profits or gains or any part thereof are not specifically receivable on behalf of any one person the operation of the proviso must apply without further consideration of the words which follow in the proviso. I prefer to rely upon the alternative, that where the individual shares of persons on whose behalf they are receivable are indeterminate the tax shall be levied and recoverable at the maximum rate. The individual shares of the person, namely of the beneficiaries, on whose behalf the income of the trust is received by the trustee are certainly indeterminate and might well vary in respect of many of the cestui que trusts from year to year according to the wish or even the whim of the trustee himself. That being so the provision of the proviso comes into operation and the tax which is leviable must be at the maximum rate prevailing during the year of the assessment. On behalf of the applicant it was contended that since S. 10 of the Act provides for tax being payable by an assessee under the head of profits and gains of a business, profession or vocation, there should be a separate assessment in respect of the business profits inasmuch as no reference is made to business profits and gains in S. 41 (1). Section 8 provides for the payment of tax by an assessee upon interest on securities. By S. 9 the assessee pays tax upon income from property. It was not suggested, in the course of argument, that there should be separate assessments in respect of securities and property as well as of the business income of the trust. Section 41 (1) makes no mention either of business, securities or property. It deals with income, profits and gains which a trustee is entitled to receive and the tax is to be levied upon the trustee in the same manner and to the same amount as it would be leviable upon or receivable from the person on whose behalf income, profits and gains are receivable. The provisions of this section relate to all trust income, profits and gains. It was conceded that if there had been no trust created by the settlor then, during his lifetime, he would have been properly assessed in one assessment in respect of the income which the trustee now receives. Section 41 (1) enables a trustee to be assessed in respect of the income, profits and gains of a trust as a whole whatever its source may be and the expression "income, profits and gains" relates to all income which reaches the hands of a trustee whether it is from investments in securities and from immovable properties, or upon the profits of a business which the trustee, as such, conducts and which belongs to the trust.

Reference was made to S. 25A of the Act and it was argued that since there was an assessment up to the year 1939-40 upon a Hindu undivided family, since partition has not taken place and no order has been made by the Income-tax Officer under the provisions

of S. 25A (2) it must follow that an assessment should continue to be made upon the entity of a Hindu undivided family. Particular reliance was placed upon sub-s. (3) which is as follows : "Where such an order has not been passed in respect of a Hindu family hitherto assessed as undivided, such family shall be deemed, for the purposes of this Act, to continue to be a Hindu undivided family." This provision can only relate to income, profits or gains from property belonging to a Hindu undivided family. The property, the subject of the present reference, is not such property, but it is the property of a trust. Further the beneficiaries of the trust are not only the members of a Hindu family, which may or may not be undivided, but also a school, a hostel and such other charities to which the trustee may feel disposed to make payments. An assessment cannot be made in respect of income, in which such institutions are entitled to participate, as upon a Hindu undivided family. Moreover the members of the Hindu family, who are cestui que trusts are entitled to participate under the trust, not as members of such family but as beneficiaries of the trust. There are two questions which have been referred : (1) Whether in the facts and circumstances of the case the assessment of the whole income of the trust in the hands of the trustee in one assessment was valid in law? (2) Whether in view of the provisions of sub-s. (1) of S. 41, Income-tax Act, the tax was correctly levied in this case at the maximum rate? In my view the answer to each question should be in the affirmative.

DERBYSHIRE C. J. — I agree.

KHUNDKAR AND BISWAS JJ.

Maharani Nilimaprova v. Kadambini Dasi.

Civil Rule No. 1315 of 1943, D/- 21-3-1944.

Civil P. C. (1908), S. 115—Word "thereto" refers to High Court—Order appealable only to lower Court but not to High Court—Order can be interfered in revision.

[P 310 C 1]

BISWAS J.—The petitioner in this case, Maharani Nilimaprova Nandy, lent a sum of Rs. 15,000 to opposite party 2, Lalit Mohon Saha on the mortgage of a certain property in Kalighat, being premises Nos. 71B and 71C, Kalighat Road, and obtained a decree on the mortgage on 19th September 1940. On 31st January 1941, the petitioner filed an application for execution of the decree. The opposite party No. 2 thereupon applied for reopening of the decree under S. 36, Bengal Money Lenders Act, but the application was rejected. He then applied to a Debt Settlement Board for relief under the Bengal Agricultural Debtors Act, but this too was refused. Thereupon it is said he caused a suit to be instituted by his mother Kadambini Dasi, who is opposite party No. 1 in this rule, claiming a two-thirds interest in the property as heir of two deceased minor sons, on the allegation that the property had been purchased by opposite party No. 2 with funds belonging to the joint family of which he and the said two minors were members. In this suit Kadambini prayed for a declaration of her title to a two-thirds share of the property and of her right of residence therein, and a further declaration that the mortgage was a fraudulent and collusive transaction not binding upon her, and finally for a declaration that the property was not liable to be sold in execution of the mortgage decree. There was no prayer in terms of a permanent injunction to restrain the petitioner from bringing the property to sale. The day after the suit was filed the opposite party No. 1, however, made an application asking for a temporary injunction to restrain the sale. In the meantime the petitioner had filed her written statement in the suit, in which among other things she raised the question of insufficiency of court-fees, and further contended that the suit was hit by S. 42, Specific Relief Act, inasmuch as this was a case in which the plaintiff should have asked for consequential relief, but had not done so. The learned Subordinate Judge took up the question of court-fees which was the subject-

matter of issue 5, along with the application for temporary injunction and disposed of both these matters by the same order. He held that the court-fees paid were sufficient, and as regards the temporary injunction, he made an order as asked for, holding that this was necessary in order to avoid multiplicity of suits and further complications. It is against this order which was made on 17th July 1943, that the present rule is directed.

As already stated, the order falls into two parts, one dealing with the question of court-fees and the other with that of the temporary injunction. So far as the question of temporary injunction is concerned, Mr. Banerjee on behalf of the opposite party contends that the order was appealable and that it was consequently not open to revision. Mr. Banerjee is quite right in saying that this Court will not ordinarily interfere in revision where the petitioner has a right of appeal whether the appeal lies to the High Court or to a Court subordinate to a High Court. At the same time, it is difficult to hold that where the appeal lies to the lower appellate Court, revision is shut out by the express words of S. 115, Civil P.C. That section provides: "The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto." The precise meaning of the word "thereto" has given rise to some controversy, but it seems to us that it can only refer to the High Court and not to a Court subordinate to the High Court. This was the view which was expressed by Mitter J. in 63 C.L.J. 105,¹ and this was approved by a Division Bench of this Court in 44 C. W. N. 364,² although the precise point which is involved in the present case did not arise there. The order in question in that case was one in which there was or might be an ultimate appeal to the High Court, whereas it is not disputed that the order here is one which is not subject to appeal to this Court at all. There is only one appeal provided by the Code, and that lies to the District Judge. It seems to us therefore that the only question we are called upon to decide is not whether we have the power to interfere under S. 115, but whether this is a proper case in which we should interfere.

Having considered all the facts and circumstances, we are of opinion that there is absolutely no justification for directing a temporary injunction of the mortgage sale. The object of Kadambini's suit is to protect her interest and a temporary injunction could be granted only if that interest was likely to be in jeopardy as a result of the sale. The property, which was the subject-matter of the sale in execution of the mortgage decree could not be said to include such interest. What would pass at the sale would be the interest of the judgment-debtor Lalit Mohan Saha, and that was wholly outside the scope of Kadambini's suit. This being so, there is no reason why the sale should be stayed pending the decision of the question of title raised by Kadambini. (His Lordship then proceeded to consider the question of court-fees and after expressing his opinion that the question of court-fees might be said in a way to be bound up with the question of the maintainability of the suit under S. 42, Specific Relief Act, directed.) The order which the learned Judge has already passed on the question of court-fees cannot really be maintained unless the other issue is disposed of. We accordingly set aside that order and direct that the learned Judge should take up that other issue first and come to a decision as to the real nature of the suit. If he holds that it is a mere declaratory suit, he would have to consider whether the suit can be maintained. If he holds that it is maintainable, then no further question arises regarding court-fees. If, on the other hand, the learned Judge thinks that in the absence of a prayer for consequential relief the suit cannot lie, the

suit will fail on that very ground, and the question of court-fees will not arise, unless he thinks that an opportunity should be given to the plaintiff to amend the plaint. If the amendment is allowed, then only will the question of court-fees have to be considered. It would be open to the plaintiff to put her own valuation on the consequential relief, subject to the provisions of S. 8(c), Court-fees Act. It is not necessary for us to indicate at this stage what are the principles which the learned Judge should apply in valuing the consequential relief which the plaintiff might ask for. The rule is accordingly made absolute in these terms. We make no order as to costs. Let the record be sent down as early as possible.

KHUNDKAR J. — I agree.

R. C. MITTER AND BLANK JJ.

Nanda Lal v. Askaran Baboo.

Appeal No. 203 of 1941, D/- 14-1-1944.

(a) Bengal Tenancy Act (8 of 1885), Ss. 52 and 179—Contracts prior to Act are not affected by S. 52—Only contracts after Act between landlord and tenant in non-permanently settled area or between landlord and tenant in permanently settled area other than mourasi mukarari tenant are illegal if they preclude tenant from claiming abatement of rent. [P 313 C 1]

(b) Interpretation of statutes—Vested rights—They are taken away, if intention is expressed or can be gathered by necessary implication. [P 312 C 1; P 313 C 1]

(c) Bengal Tenancy Act (8 of 1885), Ss. 67, 178 and 179—Interest—Pre Act contract—Both rate and mode of calculation are affected—Post Act contract—Only rate not mode of calculation is affected. [P 314 C 1]

(d) Bengal Tenancy Act (8 of 1885), Ss. 197 proviso and 67—"Recover" explained—Rate at time of decree is to be considered. [P 314 C 2]

(e) Practice—Mistake of Court—Party should be relieved of prejudicial consequences. [P 314 C 2]

JUDGMENT.—The Maharaja of Burdwan held two villages Sundarpore and Char Bajramari in lakhiraj right. Before 1865 he settled 8 annas share of these villages in mukurari mourasi right with Bhairab Babu and the remaining 8 annas share with Amarchand Babu in the same right. Thus two mukurari mourasi tenures, each comprising an undivided 8 annas share in the lands of these two villages, were created. For the sake of convenience we will designate these two tenures as Mudafat Bhairab and Mudafat Amar Chand. The successors-in-interest of Bhairab Babu and Amar Chand Babu in their turn granted two dar-mukarari mourasi leases to Nobo Krishna Mukherjee by two separate pottas executed in the year 1865. The annual rent reserved by each potta was Rs. 2050. The pottas executed by Bhairab Babu's successors-in-interest is on the record (Ex. 1 (a) 1) but the other potta has not been produced. It is admitted by the parties that the two dar-mukarari mourasi pottas were on the same terms. The tenant agreed not to claim abatement of rent on account of diluvion and the landlord agreed not to claim increase of rent on account of accretion. In 1866 Nobokrishna Mukherjee instituted a suit against his landlords who were Bhairab Babu's successors for certain reliefs. That suit ended in a compromise on 2nd June 1867. The terms of compromise were embodied in a rajinamah (Ex. 2) executed by the tenant and a safinamah executed by the landlords (Ex. 2a). As a result of the compromise the annual rent was reduced from Rs. 2050 to Rs. 1700. There is, as in the original potta, an express stipulation that the rent would not be increased or reduced on account of alluvion and diluvion. The rent of the other darmukurari tenure which the successors-in-interest of Amar Chand Babu had granted, however, remained unchanged.

In 1897 Nimchand Babu, Hazari Mull Babu and Mohanlal Babu, who were descendants and successors-in-interest of Amar Chand Babu purchased one-half share of the tenure Mudafat Bhairab. They thus became

1. ('36) 23 A. I. R. 1936 Cal. 786 : 63 C. L. J. 105, Sashi Kanta v. Nasirabad Loan Office Co.

2. ('40) 27 A. I. R. 1940 Cal. 257 : 44 C. W. N. 364, Nafar Chandra v. Kalipada Das.

owners of Mudafat Amar Chand and of one-half share of Mudafat Bhairab. Thus they acquired an undivided twelve annas share in mukarari mourasi right in the lands of village Sundarpore and Char Bajramari. The defendants' father, Gopal Chandra Banerjee, purchased on 2nd April 1899, both the dar mukarari tenures which belonged to Nobo Krishna Mukherjee. He accordingly became the tenant of Nimchand Babu, Hazari Mull Babu and Mohanlal Babu and some of the descendants of Bhairab Babu in respect of dar mukarari held under Mudafat Bhairab, and the tenant under Nimchand Babu, Hazarimull Babu and Mohanlal Babu in respect of the other darmukarari tenure. Nimchand Babu, Hazarimull Babu and Mohanlal Babu thus became entitled to realise from Gopal Chandra Banerjee the whole rent of the dar mukarari held under Mudafat Amar Chand (Rs. 2050) and half of the rent of the darmukarari tenure held under Mudafat Bhairab (Rs. 850). The total was Rs. 2900. There was thereafter a kharij in the year 1900 and on 24th August 1900, a kharij dakhili potta was granted by Nimchand Babu, Hazarimull Babu and Mohanlal Babu in his favour. For the 12 annas undivided share which Nimchand Babu, Hazarimull Babu and Mohanlal Babu then had in the lands in the said two villages in mukarari mourasi right, Gopal Chandra Banerjee agreed to pay an annual rent of Rs. 2900. Exhibit 1 is the kharij dakhili potta. There is also a stipulation in this potta that there would be no increase or reduction of rent on account of alluvion or diluvion. Presumably the other owners of the mukarari mudafat Bhairab agreed to the kharij. From the time of this kharij dakhili potta there were thus two darmukarari tenures—one comprising an undivided four annas share of the lands of the said two villages held at an annual rent of Rs. 850 under some of the descendants of Bhairab Babu, and the other comprising an undivided twelve annas share in those lands held at an annual rent of Rs. 2900 under Nimchand Babu, Hazarimull Babu and Mohanlal Babu, the descendants of Amar Chand Babu. Those two darmukarari tenures have been described in schedules kha and ka of the plaint and for brevity's sake will be designated respectively as the 4 annas darmukarari and 12 annas darmukarari tenure. At a partition effected between the sons of Nimchand Babu, Hazarimull Babu and Mohanlal Babu the landlords' interest of the 12 annas darmukarari tenure was allotted to the plaintiff's share, he being the son of Nimchand Babu. The plaintiff also acquired by purchase on 8th July 1931, the landlord's interest of the 4 annas darmukarari tenure. On 15th April 1940, he filed the suit in which this appeal arises. Therein he claimed arrears of rent and cesses for the years 1343 to 1346 B.S. in respect of the two darmukarari tenures described in Schs. ka and kha at the rates of Rs. 2900 and Rs. 850 per year respectively together with interest at the rate of twelve per cent. per annum calculated on monthly kists in accordance with the stipulations in the darmukarari leases and the Kharij Dakhili potta of 1900.

The defendants stated in their written statement that a good portion of the two villages had been engulfed by the river Hooghly and were in the river bed in the years in suit. They accordingly pleaded that they were entitled to proportionate reduction of rent. To determine the extent of the diluvion they prayed for a local investigation. The learned Subordinate Judge has refused their prayer for local investigation, holding that on the terms of their engagement with the landlords they are not entitled to claim reduction of rent on account of diluvion. The second defence that was taken was that the plaintiffs could not claim interest at a higher rate than $6\frac{1}{2}$ per cent. calculated quarterly. The learned Subordinate Judge has given the plaintiffs interest at the rate of 12 per cent. per annum up to Sraban 1345 B. S. (=August 1938) and thereafter at the rate of $6\frac{1}{2}$ per cent. per annum. He has omitted to grant post-decretal interest. In this appeal which has been preferred by the receiver of the defendants' pro-

perties he contends (1) that the defendants are entitled to claim reduction of rent on account of diluvion notwithstanding the stipulations in the pottas and (2) that the plaintiff cannot claim interest at more than $6\frac{1}{2}$ per cent. for the whole period and that the calculation of interest must be on the basis not of monthly kists, but interest has to be calculated on the arrears due at the end of each quarter of the year. Both these points have been argued before us with great ability by the advocates on both sides and we are indebted to them for the assistance they have given us. The first point has been urged by Mr. Gupta appearing for the appellants in the following manner : (1) that every tenant of agricultural land is entitled to proportionate reduction of rent on account of diluvion by reason of the provisions of S. 52, Ben. Ten. Act. He has a statutory right after the passing of the Bengal Tenancy Act which cannot be taken away from him by contract except only in those cases which fall within S. 179, Ben. Ten. Act; (2) that S. 179, Ben. Ten. Act, is not applicable to a permanent tenancy appertaining to a permanently settled estate where such tenancy had been created before the passing of the Bengal Tenancy Act; (3) that accordingly the defendants are entitled to get reduction of rent on account of diluvion, notwithstanding the contract between the landlord and tenant that there would be no reduction of rent on account of diluvion as both the tenures had been created before 1885 when the Bengal Tenancy Act was passed.

In our judgment the first point raised by him is academical so far as the 12 anna darmukarari tenure is concerned. In our judgment that tenure was created in 1900 by what has been called the kharij dakhili potta (Ex. 1). The effect of Ex. 1 was not merely to split up the darmukarari tenure under Mudafat Bhairab into two parts and to amalgamate one such part with the darmukarari tenure held under mudafat Amarchand. No doubt the rent reserved by Ex. 1 equals in amount half the rent payable for the first darmukarari tenure and the rent payable for the second darmukarari, but the terms and conditions of the kharij dakhili potta, Ex. 1 are in material particulars different from the terms and conditions of Ex. 1 (a), the darmukarari potta of 1865. As the 12 annas darmukarari tenure described in Sch. ka of the plaint was created after the passing of the Bengal Tenancy Act, S. 179 of that Act is applicable in any view of the matter and the contract as embodied in Ex. 1, which is that the tenant would not be entitled to claim reduction of rent on account of diluvion, must be given effect to. As, however, the other darmukarari tenure must be taken to have been created before the Bengal Act, as it continued to be governed by the terms expressed in Ex. 1 (a), the questions so raised by Mr. Gupta must be decided by us. The substantive part of S. 179—para. 1—is in the nature of a proviso to the other provisions of the Act dealing with the rights of landlords and tenants. It is thus a proviso to sub-s. (1) of S. 52. That sub-section enacts that every tenant, whatever may be the class to which he belongs—tenure-holder, under-tenure-holder, settled raiyat, occupancy raiyat, non-occupancy raiyat or under-raiyat—would be entitled to reduction of rent on account of loss of or deficiency in area of his tenancy—and the landlord of every class of tenant would be entitled to get additional rent for gain to or increase of area of the tenancy, and para. 1 of S. 179 enacts that those provisions are not to apply to permanent mukarari tenancies situated in a permanently settled area where there is a contract between the landlord and the tenant of such a tenure in modification of those provisions. The language of that paragraph of S. 179 suggests that the Legislature was contemplating the cases of permanent mukarari leases in such an area to be granted after the Bengal Tenancy Act. It is, in our opinion, in this sense that the observations made in some decisions of this Court to the effect that that paragraph of S. 179 applies to permanent mukarari leases granted after the passing of the Bengal

Tenancy Act must be understood. We will notice some of these decisions hereafter.

It was the common law of the country that every tenant of agricultural land was entitled to abatement of rent on account of diluvion. Section 18 of Act 10 of 1859 and S. 19 of Act 8 of 1869 gave it statutory recognition in the case of occupancy raiyats with the result that other classes of tenants still enjoyed the privilege under the common law. Those classes of tenants and even occupancy raiyats could contract themselves out of that right, before the passing of the Bengal Tenancy Act, for neither Act 10 of 1859 nor Act 8 of 1869 contain any provision which made a contract, by which the tenant agreed not to claim abatement of rent on the ground of diluvion, illegal: 1 Marsh. 558,¹ 1864 W. R., Act X R. 42² and 59 Cal. 155.³ A tenant of a permanent mukurari tenure, the lands whereof are within a permanently settled estate, could therefore enter into a contract with his landlord before the passing of the Bengal Tenancy Act agreeing not to claim abatement of rent on the ground of diluvion, and on the basis of such a contract the landlord would have the right to resist the tenant's claim to abatement of rent on that ground if such a claim had been preferred before the Bengal Tenancy Act was passed. The question is whether such a valuable right of the landlord resting on a pre Bengal Tenancy Act contract has been taken away by the Bengal Tenancy Act. It was a vested right, and according to well established principles of construction of statutes it can only be taken away either expressly or by necessary implication.

Sub-section 1 (b) of S. 52, Ben. Ten. Act, has recognised and given definite shape to the common law right of every tenant to claim abatement of rent on account of diluvion. It has also provided for the case where reduction of rent can be claimed by the tenant where the area of land in his enjoyment is found by measurement to be less than the area originally let out. In this respect it is wider in scope than the provisions of S. 18 of Act 10 of 1859 and S. 19 of Act 8 of 1869. The Bengal Tenancy Act has also introduced a provision, S. 178, the like of which was not in those two Acts, which has made certain classes of contract between landlord and tenant illegal. That section is divided into three parts. Sub-section (1) deals with contracts between landlord and tenant made both before or after the passing of the Bengal Tenancy Act. Sub-section (2) deals with only one class of contracts made between 15th July 1880 and the passing of the Bengal Tenancy Act. That sub-section is not material for this case. Sub-section (3) deals with contracts made after the passing of the Bengal Tenancy Act. If the provisions of sub-ss. (1) and (3) of that section be only taken into consideration and nothing else, the conclusion would follow that the agreement contained in pre Bengal Tenancy Act contracts between the landlord and all classes of tenants in respect of any land, be the land within a permanently settled estate or not, by which the tenant agreed not to claim abatement of rent on account of diluvion, as also such an agreement contained in post Bengal Tenancy Act contracts between the landlord and the tenant of every class in respect of every class of land whether within a permanently settled estate or not, except raiyats, would be valid and enforceable after the passing of the Bengal Tenancy Act, but the decisions do not support this broad conclusion.

In 48 I. A. 39⁴ there was such an agreement between the landlord and the tenant of a permanent tenure covering lands in a non-permanently settled estate in a contract entered into after the passing of the Bengal Tenancy Act. That agreement was held to be invalid

although S. 178, sub-s. (3), cl. (f) (=cl. (e) as it now stands) refers only to raiyats and not tenure holders. In the High Court, Woodroffe and Chaudhury JJ. held that notwithstanding the fact that cl. (f) of sub-s. (3) (=cl. (e)) of S. 178 made such a post Bengal Tenancy Act agreement invalid only in respect of a raiyat, S. 52 was not subject to agreement except as regards one particular class of tenants in permanently settled areas mentioned in S. 179. That view was accepted by the Privy Council and the claim of the tenant to abatement of rent, in spite of his contract, was allowed on the ground that though he was a permanent tenure holder his tenure comprised lands in a non-permanently settled area. The decision of the Judicial Committee has affected the decision in 22 C.W.N. 56n,⁵ if in that case the contract was after the passing of the Bengal Tenancy Act. 48 I. A. 39⁴ is a direct authority for the proposition that an agreement that the tenant would not claim abatement of rent on grounds which fall within S. 52, sub-s. (1), cl. (b) contained in a contract made after the Bengal Tenancy Act is invalid except in one class of cases, namely where the tenancy is a permanent mukurari tenure and comprises lands in a permanently settled area. In that case the effect of such an agreement in a pre Bengal Tenancy Act contract was not under consideration. The learned advocate for the appellants, however, asks us to consider the implications of that judgment in relation to a pre Bengal Tenancy Act contract. According to him those implications are: (i) that the absence of a clause in sub-s. (1) of S. 178, to the effect that nothing in a pre Bengal Tenancy Act contract shall take away the right of a tenant to apply for reduction of rent under S. 52, is not material from the point of view of the tenant; (ii) that after the Bengal Tenancy Act and from the date of its passing the tenant had a statutory right to claim abatement of rent, where the case fulfils the requirements of S. 52, and (iii) that that statutory right is not subject to contract that is to say, (a) if the contract be made after the passing of the Bengal Tenancy Act, it is void ab initio unless the case comes within S. 179, and (b), if made before the passing of the Act, it ceases to be binding from the moment the Bengal Tenancy Act came into force.

The second proposition and the first part of the third proposition (No. (iii) (a)) are sound. The first proposition would follow from the manner in which the contention of the landlord based on S. 178 sub-s. 3 cl. (f), as it then stood (=cl. (e) of the Act as in force now), and on the principle of *expressio unius exclusio alterius* was negatived, but in our judgment what we have enumerated as proposition No. (iii) (b) does not necessarily follow from either the decision of this Court or of the Privy Council in that case. In that case a post Bengal Tenancy Act contract was under consideration, a contract which was admittedly within the purview of the Bengal Tenancy Act, and the observations of the Judges of this Court, which met with tacit approval of their Lordships of the Judicial Committee, must be taken in reference to that fact. The intention of the Legislature that can be gathered from Ss. 52 and 179 is, in our judgment, as follows: The Legislature embodied the common law of the land, so far as it related to diluvion, in S. 52 sub-s. (1) (b). In that sense what was common law before became statutory law. It further stated that the rights so defined in that section are not to be curtailed or modified by any contract between the landlord and tenant except in one class of cases precisely defined in S. 179. In that section (S. 179) the Legislature contemplated futurity. In a series of cases decided by this Court it has been held that S. 179 contemplates contracts made after the passing of the Bengal Tenancy Act: 29 C.L.J. 40;⁶ 44 C.L.J. 220;⁷ 58 C. L. J. 5. ('18) 22 C. W. N. 56n, Secy. of State v. Kamal Krishna. 6. ('19) 6 A.I.R. 1919 Cal. 722: 29 C. L. J. 40, Afiladdi v. Satish Chandra. 7. ('27) 14 A.I.R. 1927 Cal. 41: 44 C. L. J. 220, Jogesh Chandra v. Asaba Khatun.

1. 1 Marsh. 558, Afsuroodeen v. Shorooshee Bala Dabie.
2. (1864) 1864 W. R. Act X R. 42, Enayutoolah v. Elaheebuksh.
3. ('31) 18 A.I.R. 1931 Cal. 537: 59 Cal. 155 (F.B.), Arun Chandra v. Shamsul Huq.
4. ('21) 8 A. I. R. 1921 P. C. 33: 48 I. A. 39 (P. C.), Khetramani Dassi v. Jiban Krishna.

18; 58 C. L. J. 93.⁹ That also is the basis of the decision in 4 C. L. J. 527.¹⁰ So a contract, if made after the passing of the Bengal Tenancy Act between the landlord and any class of tenant of agricultural land in a permanently settled area other than a mourasi mukurari tenant, and a contract between the landlord and every class of tenant of agricultural land in a non-permanently settled area, is to be regarded as illegal if such a contract precluded the tenant from claiming abatement of rent on any ground mentioned in S. 52 of the Act. But contracts of that nature between landlords and tenants which were in existence at the time of the passing of the Bengal Tenancy Act are outside the purview of the Bengal Tenancy Act, and would not be affected by S. 52 of that Act. If the Legislature had intended otherwise, it would have expressed its intention by adding a clause in sub-s. (1) of S. 178 similar to cl. (e) of sub-s. (3).

The view that pre Bengal Tenancy Act contracts between landlord and tenant are outside the purview of the Bengal Tenancy Act is the view which Prinsep J. expressed in 22 Cal. 658.¹¹ That view apparently had the concurrence of Ghose and Rampini JJ. for if they had held the opinion that the contract in that case (which was made in 1881) was within the purview of the Bengal Tenancy Act, S. 29, cl. (b) would have been a complete answer to the landlords' claim for rent at the rate of Rs. 4 per bigha. It is a rule of construction that the Legislature is to be presumed not to take away vested rights, and that presumption would yield only if a clear intention to the contrary is expressed or can be gathered by necessary implication from its enactments. There is no express provision and we do not find any provision in the Bengal Tenancy Act which by necessary implication has taken away the rights of the landlord under a pre Bengal Tenancy Act contract to realise the full rent in spite of diluvion. Paragraph 1 of S. 179, Ben. Ten. Act has not done it. That part of the section, as we have already noticed, contemplates agreements between landlord and tenant made after the passing of the Bengal Tenancy Act and so the only necessary implication of that part of that section is that an agreement, by which the tenant abandons his right to claim abatement of rent on the ground of diluvion of the lands of his tenancy, if made after the passing of the Bengal Tenancy Act, between a landlord and a tenant, other than a mourasi mukurari tenant, is void, as also such an agreement between a landlord and mourasi mukurari tenant, where the land is not within a permanently settled area. Though the case was not argued as before us and no express decision was given, the effect of the decision in 32 C. W. N. 295¹² was that an agreement of the year 1884 (pre Bengal Tenancy Act agreement) of the nature which we have before us is valid and enforceable after the passing of the Bengal Tenancy Act. In that case the tenant got no abatement for diluvion. The decision in 19 I. C. 924¹³ also supports the view we are taking. We accordingly hold that the defendants are precluded by contract from claiming reduction of rent on account of diluvion.

For considering the question about interest, the amendments of three sections of the Bengal Tenancy Act are material. They are Ss. 67, 178 and 179. Section 67 of the Act as originally framed enacted that arrears of rent shall bear simple interest at the rate of 12 per cent. per annum from the end of the quarter of the agricultural year in which the instalment fell due. By the amendment of 1908, the rate was increased to 12½ per cent. and by a further amendment in 1938 (Act 6 of 1938

B. C.) the rate was reduced to 6½ per cent. Clause (i) was added to sub-s. (1) of S. 178 by an amendment in the year 1928. In the original Act a similar provision was under sub-s. (3) of that section and the amendment of 1928 transposed it from sub-s. (3) to sub-s. (1). The result was that stipulation to pay interest at a higher rate than that provided for in S. 67 contained in leases executed before the passing of the Bengal Act became unenforceable after that amendment in those cases where that section was applicable. Section 179 was also amended in 1928 by the addition of the proviso. Though the four annas darmukurari tenure is governed by a contract made before the passing of the Bengal Tenancy Act, and the twelve annas darmukurari tenure is governed by a contract made after the Bengal Tenancy Act had come into force, the question relating to interest in respect of both the tenancies involved in the appeal would, by reason of the said amendment of S. 178, depend upon the same considerations. The kabuliats of both the darmukurari tenures provide for payment of rent in monthly kists and both contain the stipulation for payment of interest on the arrears at the rate of 12 per cent. per annum from the first day of the following month. The first question is whether the contract for payment of interest in the aforesaid manner affects the provisions of S. 67, Ben. Ten. Act. If it does the stipulation about interest contained in the kabuliat Ex. 1 (a) became illegal from 1928, the date when S. 178, sub-s. (1) was amended by the addition of cl. (i), and the stipulation about interest in Ex. (1) was void from the beginning. If however the stipulations about interest contained in Exs. 1 and 1 (a) do not affect S. 67, the plaintiff would be entitled to claim interest on the monthly arrears from the beginning of the succeeding month and not from the end of the quarter of the agricultural year in which the instalment of rent fell due, and if the proviso to S. 179 is inapplicable he would also be entitled to claim interest at 12 per cent. for the whole period up to the date of the decree. The question as to whether the contract about interest contained in those two kabuliats affects S. 67 depends upon the precise effect of the decision of the Judicial Committee in 21 I. A. 131.¹⁴ The observations made by Lord Macnaghten at p. 134 of the report "that the provisions of S. 67 only apply to cases where rent is payable quarterly" have raised apparent difficulties in the path of the tenant, which the decisions of this Court have sought to resolve in different manners at different times. In that case the tenant had been paying interest at 12 per cent. per annum on monthly arrears from a very long time, long before the passing of the Bengal Tenancy Act. In the suit the landlord claimed interest at 12 per cent. The rate therefore did not exceed what was then mentioned in S. 67. But he claimed interest on monthly kists. The tenant contended that after passing of the Bengal Tenancy Act the landlord was only entitled to calculate interest not from the first day of the succeeding month but from the end of the quarter of the agricultural year in which the instalments fell due. The High Court upheld the tenant's contention.

The Judicial Committee of the Privy Council held that the landlord was entitled to calculate interest monthly. In 33 Cal. 683¹⁵ and 58 C.L.J. 188 the Judges of this Court dissected S. 67 into two parts and observed that the Judicial Committee had interpreted only the second part of the section. In their view the landlord could not claim interest at a higher rate than that mentioned in S. 67 on the basis of a stipulation if that stipulation was hit by S. 178. The result of those decisions is that if there was a contract to pay rent not in quarterly instalments but in other instalments—say monthly—and to pay interest at the rate of say 24 per cent. per annum and the contract is affected by S. 178, sub-s. (1) cl. (i), the rate only would be cut down to

8. ('34) 21 A. I. R. 1934 Cal. 119 : 58 C. L. J. 18, Chundi Churn v. Robini Kumar.

9. ('34) 21 A. I. R. 1934 Cal. 213 : 58 C. L. J. 93, Chundi Churn v. Abbas Ali.

10. ('06) 4 C. L. J. 527, Apparna Churn v. Karam Ali.

11. ('95) 22 Cal. 658, Tejendra Narain v. Bakai Singh.

12. ('28) 15 A. I. R. 1928 Cal. 419 : 32 C. W. N. 295, Dwijendra v. Jitendra.

13. ('13) 19 I. C. 924 (Cal.), Gunendra v. Rajendra.

14. ('94) 22 Cal. 214; 21 I. A. 131 (P.C.), Hemanta Kumari v. Jagadindra.

15. ('06) 33 Cal. 683, Narendra v. Gora Chand.

what is mentioned in S. 67, but interest would still have to be calculated not quarterly but monthly. This conclusion would go against the plain language of S. 178, sub-s. (1), cl. (i) which destroys the whole contract concerning interest. We accordingly prefer to follow the interpretation of Lord Macnaghten's judgment as given by Jenkins C. J. and Ray J. in 17 C. W. N. 881.¹⁶ In 21 I. A. 131¹⁴ the obligation on which the payment of interest rested was a pre-Bengal Tenancy Act one, and so was unaffected by S. 178 as it then stood. It was therefore upheld by the Judicial Committee of the Privy Council. Our view is that if a contract to pay interest in terms which are inconsistent with the provisions of S. 67 is affected by S. 178, sub-s. (1), cl. (i) the whole contract, the rate and the term relating to the calculation of interest would be void, and the landlord would be entitled to claim interest only in terms of S. 67. But there is great force in the observations of the learned Judges in 58 C. L. J. 18⁸ that the substantive part of S. 179 (that is to say para. 1 of that section) creates an exception to S. 178, sub-s. (1), cl. (i) also. The result would be that a contract to pay interest in terms which impose a burden on the tenant greater than that provided for in S. 67 would still be valid in spite of S. 178, sub-s. (1) cl. (i), if the contract had been made after the passing of the Bengal Tenancy Act. To what extent such a post-Bengal Tenancy Act contract would be affected by the proviso to S. 179, is however, a different question. As the substantive part of S. 179 does not relate to pre Bengal Tenancy Act contracts, pre Bengal Tenancy Act contracts relating to interest would not be saved by that section, but would be hit by S. 178, sub-s. (1), cl. (i), as there is no other provision of the Bengal Tenancy Act which saves them. The whole of such contracts would go, — the rate of interest and terms relating to the mode of calculation of interest—and the landlord would be entitled to claim interest only in terms of S. 67.

For the reasons given above we agree with the conclusion arrived at in 58 C. L. J. 18⁸ to this extent only, namely, that the landlord in that case was only entitled to claim interest at the rate mentioned in S. 67, but dissent from the other conclusion that he was entitled to calculate interest monthly. We also agree with the view expressed in 58 C. L. J. 93⁹ that the proviso to S. 179 operates only on contracts made after the passing of the Bengal Tenancy Act, as the rule of construction formulated there to support that view appears to us to have been rightly applied. The conclusions arrived at in that case may be justified on the ground that cl. (i) of sub-s. (1) of S. 178, so far as it relates to pre Bengal Tenancy Act contracts, was not applicable in that case on the ground that the cause of action of that suit arose before that clause was added by the amendment of 1928, the claim for arrears of rent being up to the year 1335 B.S. (=April 1928). In the case before us no such consideration arises. That clause applies and the stipulation about interest in Ex. 1 (a), which was executed in 1865, became illegal and so interest only in terms of S. 67 can be recovered in respect of the four anna durmukarari tenure. The stipulation about interest contained in Ex. 1, which was executed in 1900 is not affected by cl. (i) of S. 178, sub-s. (1), but by the proviso to S. 179. The scope of that proviso has therefore to be determined.

The proviso says that interest cannot be recovered at a rate higher than that mentioned in S. 67. It therefore touches the rate only if it is higher than that mentioned in S. 67, but does not touch the agreement relating to the mode of calculating interest. The second part of S. 67 is not imported into the proviso. There is thus an anomaly, namely, that whereas in pre-Bengal Tenancy Act contracts both the rate of interest and the mode of calculation of interest as agreed upon by the parties are affected, in post-Bengal Tenancy Act contracts only the first is affected but not the second. This anomaly results from the words used by the Legisla-

ture in the proviso and so cannot be avoided. The other point depends upon the meaning of the word 'recover'. It means "secure by legal process." The date when the arrears fell due is therefore of no importance. The landlord can get a decree for interest at that rate which was mentioned in S. 67, Bengal Tenancy Act, at the time when the decree is to be passed. This view which commends itself to us is supported by the decision in 57 C. L. J. 371.¹⁷ The result of our conclusions on this part of the case is that the plaintiff is entitled to interest at 6½ per cent. per annum in respect of the arrears of rent of both the tenures. With regard to the four anna dar mukarrari interest is to be calculated at the end of each quarter of the agricultural year in which the instalment falls due in terms of the kist mentioned in Ex. 1 (a), but with regard to the 12 anna darmukurari tenure interest would have to be calculated monthly. These conclusions would have reduced the amount of the decree passed by the lower Court, but for the reasons mentioned in the next following paragraphs we do not reduce the same. As the merits would not be affected by our conclusions we do not consider it necessary to refer the questions relating to interest to a Full Bench, though we have dissented from some decisions of Division Benches.

The learned Subordinate Judge has not given any post decretal interest. If interest at the usual court rate be given from the date of the decree of the learned Subordinate Judge, the amount calculated up to date would exceed the amount by which the decree of the learned Judge would be reduced as a result of our conclusions mentioned in the last paragraph. The plaintiff has not filed an appeal or a memorandum of cross-objections against that part of the decree of the learned Subordinate Judge but tries to maintain the decree as made by urging that he ought to be given interest up to the date of our decree. The question is whether it is competent to us to give him that relief. It would depend upon the question as to whether we would apply O. 41, R. 33, Civil P. C. Here the decree as made by the learned Subordinate Judge will have to be modified in the appellant's favour as a result of our conclusions. The first condition laid down in 69 C. L. J. 385¹⁸ has thus been fulfilled. The further question therefore is whether further interference is required to adjust the rights of parties in accordance with justice, equity and good conscience. This further question must depend upon the facts of each case. No hard and fast rule can be laid down. So far as the facts of this case are concerned we think that such interference is necessary. After the decree had been passed by the learned Subordinate Judge the appellant applied for stay of execution of that decree. His prayer was allowed on the condition that he would furnish adequate security to the satisfaction of the lower Court for carrying out the final decree of this Court. A security bond was executed, but the terms of the bond did not carry out the order of this Court. The learned Subordinate Judge in approving the bond had committed a sad mistake. By the bond the surety made himself liable only if the decree of the lower Court was affirmed. It should have been a bond to carry out the final decree of this Court. If we reduce the amount of the decree by a single rupee, that bond would probably be ineffective and the appellant would naturally avoid giving at this stage adequate security. This Court must on accepted principles relieve a party for the prejudicial consequences which would result from mistakes committed by the Court. The plaintiff is also justly entitled to post decretal interest. In these circumstances we invoke our powers under O. 41, R. 33 and maintain the amount mentioned in the decree of the learned Subordinate Judge. The result is that the decree of the learned Subordinate Judge is affirmed. The appellant must

17. ('33) 20 A. I. R. 1933 Cal. 703 : 57 C. L. J. 371, Tara-prasanna v. Motaher Ali.

18. ('39) 26 A.I.R. 1939 Cal. 582 : 69 C. L. J. 385, Saheb Meah v. Lalit Mohan.

16. ('13) 17 C. W. N. 881, Jasimuddin v. Beni Madhav.

pay half the costs of this Court to the plaintiff-respondent.

R. C. MITTER AND AKRAM JJ.

Brojendra Kishore v. Governor-General in Council.

Appeal No. 1494 of 1938, D/- 14-3-1944.

(a) Fishery — Several fishery — It lasts till river is navigable — River is navigable if ordinary boats pass for nine months of the year—Right to several fishery remains also in pools found in 3 months and enclosed by banks in bed of the river. [P 316 C 1]

(b) Land Acquisition Act (1894), S. 16 — Several fishery is not encumbrance on land of river. [P 316 C 2]

(c) Government of India Act (1935), S. 172 — Suit prior to 1935 by Secretary of State in Council for right of fishery when can be continued by Governor-General in Council. [P 317 C 1]

JUDGMENT.—The river Jhinai is a natural stream which rises from the river Brahmaputra and falls into the river Yamuna, which is another name for the main branch of the river Brahmaputra. In the past it was navigable throughout the year but lately on account of the formation of a sand bank near its confluence with the river Brahmaputra and by reason of its bed becoming higher in level by deposit of sand and earth it is almost dry for three or four months but is navigable during the remaining eight or nine months of the year. It is admitted, and that is also the finding of the Courts below, that the predecessors-in-interest of defendants 1 to 5 the contesting defendants had a several fishery in the river Jhinai, which was a public navigable river, the bed whereof belonged to the Crown. Whether their fishery right in the waters of the said river now exist or not by reason of the river ceasing to be navigable throughout the year is one of the questions in the appeal. For carrying the railway line of the Singjani-Fulchari branch of the Eastern Bengal Railway (now the Bengal and Assam Railway), which belongs to Government, over the river Jhinai a portion of the bed of the river was acquired under the Land Acquisition Act. The portion so acquired covers Dag Nos. 23 to 27 of mouza Char Banipakuria, also known as Char Palisa. A railway bridge was constructed over the place. Owing to scouring a depression has been formed under the railway bridge. Water remains in that depression throughout the year. A sort of raised bank has been found round this depression. In the dry season for three or four months of the year when the waters of the river Brahmaputra do not flow into the river Jhinai this depression looks like a pond surrounded by dry land on all sides but during the rains and the remaining part of the year it is swallowed by the flowing waters and becomes a part of the river Jhinai which is then navigable. That is the finding of the Commissioner and of both the lower Courts. The suit concerns this pool of water.

On 21st January 1936, before Part 3 of the Government of India Act, 1935, had come into operation the Secretary of State for India in Council instituted the suit in which the appeal arises for a declaration of title to fishing rights in that depression, for possession and for a permanent injunction to restrain the defendants from fishing in that place. Before the suit the railway administration had granted a licence to one Ramjatanal to fish there and the suit was the consequence of the obstructions offered by the defendants to Ramjatanal. After Part 3 of the Government of India Act, 1935, had come into operation an application was moved by the plaintiff for amending the cause title. That application was allowed and in place of the Secretary of State for India in Council the Governor-General in Council was substituted. Many defences were raised. The learned Munsif found that defendants 1 to 5 had a several fishery in the river Jhinai but their right extended to eight annas only and the remaining eight annas was still vested in the Crown, as the Crown had not made a grant of the same to a subject, and the defendants'

right had not been destroyed by the land acquisition proceedings. Although he held that the fishery to the extent of eight annas still belonged to the Crown he refused to give the plaintiff either a declaration of title or joint possession with the defendants on the ground that after Part 3, Government of India Act, had come into force, the Province of Bengal only and not the Central Government could bring the suit.

On appeal the judgment of the Munsif has been reversed. The learned Subordinate Judge has held : (1) that the defendants' right to fish in the pool had ceased because of the silting up of the river ; (2) that the defendants' right to fish in that pool had been extinguished by reason of the land acquisition proceedings, the said right being an encumbrance on the land acquired ; and (3) that the Governor-General in Council was entitled to maintain the suit "as the Governor-General is the representative of the Crown" and as the Railway Administration is under the Governor-General in Council." The contesting defendants have preferred this second appeal. In one place of his judgment the learned Subordinate Judge remarked that the disputed pool of water was a closed water but the finding taken along with his other findings mean that during the dry season, for about three or four months of the year, the pool of water is not connected with the flow of the river Jhinai, for in those months the river Jhinai has no flow. The Commissioner's report, on which both the lower Courts have proceeded makes it clear that the river Jhinai has well defined banks. Its bed therefore is what lies within those banks and the pool of water lies between the defined banks and so is within the bed of the river. During the dry weather there is no water in this bed but water remains in the disputed pool which at some places is deep. It looks at that season like a closed pond or doba but during the rest of the year the pool is engulfed in the stream and becomes a part of a flowing navigable river.

It is, therefore, not a pool which can be regarded either as an adjunct of the river or a sheet of water outside the river, but it is a part and parcel of the river itself, lying in its existing permanent bed, and the defendants would have a right to fish in it also, if their right to fish in the waters of the river still subsists, although that pool of water is not connected throughout the year with the flowing waters of the stream: 17 C. W. N. 1173¹ and 44 C. W. N. 1017² at p. 1022. The question, therefore, is whether the right of the defendants to fish in the waters of the river Jhinai has been extinguished, (a) by reason of the river ceasing to be navigable throughout the year, and (b) by reason the land acquisition proceedings by which that portion of the bed in which the pool lies was acquired. Whether in India the public in general have a right to fish in a navigable river or not, it is settled law that the Crown can grant to a subject a several and exclusive fishery in such a river : 11 Cal. 434.³ In 41 I. A. 221,⁴ Lord Sumner dealt with the nature of a several fishery in a navigable river.

The propositions of law laid down in that case which are material to the case before us may be summarised thus : (i) that a several fishery must be founded upon a grant from the Crown; and (ii) that the river need not flow over the land of the Government and the right of the Government does not depend upon the ownership of the subjacent soil but upon the navigability of the stream. The second proposition leads to two necessary consequences : (a) that as the right to fish in a several fishery does not depend upon the ownership of the bed of the river and has no connexion with it such a fishery in a navigable river cannot be regarded as mere profits

1. ('13) 17 C. W. N. 1173, Ahmadi Begum v. Mahasay Taraknath.

2. ('40) 27 A.I.R. 1940 Cal. 506 : 44 C.W.N. 1017, Pravatibati v. Secy. of State.

3. ('85) 11 Cal. 434 (F.B.), Hori Das Mal v. Mahomed Jaki.

4. ('14) 1 A.I.R. 1914 P. C. 48 : 41 I. A. 221, Srinath Roy v. Dinabandhu Sen.

of the soil, and (b) that the right depending as it does on the navigability of the river, would last so long as the river retains its navigable character. The last mentioned proposition was in express terms formulated in 17 Cal. 963⁵ a decision which was approved by Lord Sumner at page 234 of the report. Though the flux and reflux of tide is *prima facie* evidence that a river is navigable, as tide helps navigation, it does not necessarily follow that a river is navigable because it is tidal or that it is not navigable because it is non-tidal. There are mighty rivers in India which for its greater length are not tidal though the channels are deep. The question is a question of fact and actual user is the best evidence of navigability. In India to make a river a navigable one it is not necessary that its waters must be very deep.

If it allows country boats of ordinary size,—such as are usually employed for carrying merchandise—to pass it would be regarded as navigable. In 37 C.W.N. 442⁶ it was held that a river can only be regarded as navigable if it allows boats of ordinary size employed in commerce to pass throughout the year. That case however concerned a right of navigation and we do not think that for extinguishing a right to a several fishery the test of navigability throughout the year is the correct test. Nor would the observations made in 17 W. R. 73⁷ to the effect that a river is to be regarded as navigable only if boats can pass at all seasons of the year is relevant on the question before us, for that case related to claim to land gained by alluvial accretion and the phrase “large and navigable rivers” used in Regn. 11 of 1825, were taken to mean big rivers, such as “the Ganges and the Megna upon which navigation can always be carried on,” and not small rivers which were merely unfordable at times. The case in 15 W.R. 212⁸ concerned a fishery but the question was neither raised nor decided and that the river was navigable throughout the year was recited only as a fact in the judgment. The right in a subject in a several fishery would cease if the river loses its navigable character but the question whether the river has lost its navigable character is a question of fact. The fact that its channel is deep for about nine months of the year, not in the rainy season only and that boats used in commerce can navigate it during the greater part of the year are important. From those facts and from the fact that it is connecting link between two great streams and serves as an important high way we conclude that the river Jhinai has not lost its navigable character although no boats can pass for about three months in the year. The defendants would therefore have the right to fish in the pool which is the subject-matter of the suit, unless they have lost the right to fish in that part of the river by reason of the acquisition under the Land Acquisition Act.

The question before us concerns the river itself, not its adjuncts, nor pools or sheets of water left in the deserted bed of the river, the main channel of which had shifted and which is still navigable, and our observations to the effect that the right of a subject to a several fishery in a navigable river is extinguished on the river losing its navigable character must be taken to be limited to the type of cases which we have before us. For the purpose of constructing the railway line a portion of the bed, which is now occupied by the pool was acquired after 1894, and compensation for the land was paid, rightly or wrongly to the defendants, but no compensation was awarded for the fishery. We do not think that by the acquisition of the land the fishery in that part was also acquired, for though by the definition in S. 3 (a), Land Acquisition Act, 1894, land includes benefit to arise out of land, a several fishery cannot be taken to be benefit arising out of land. The dictum

that fisheries are in their nature mere profits of the soil on which the water stands is true only in regard to territorial fisheries, for there the right to fish arises from the right to the soil, but a several fishery in a navigable river is an incorporeal right. There the right to fish arises not from the right to the soil but from the fact of the navigability of the river: 41 I. A. 221.⁹ The question then is whether a several fishery in a navigable river can be regarded as an encumbrance on the land that is, on the subjacent soil.

On the principles laid down in 41 I. A. 221⁹ we do not think it to be so. It would not accordingly be destroyed on a compulsory acquisition by the force of the provisions of S. 16, Land Acquisition Act. Every burden is not an encumbrance. A natural right, for instance of a riparian owner to have an undiminished and unpolluted flow of a natural stream, is not an encumbrance and is not accordingly destroyed under S. 16, Land Acquisition Act, on a portion of the bed of the stream being acquired under that Act: 47 C.W.N. 130.⁹ An encumbrance on land means a burden or charge which has been created either by the act or omission of the owner of the land and which affects or diminishes the value of the land. A several fishery cannot be regarded as an encumbrance, for it has no connexion with the act or abstention of the owner of the land over which the navigable river flows. This becomes clear from the case of a shifting river. Thus where a navigable river breaks into the land of another and flows through it the person having the right in the several fishery follows the fish in the new channel. His right does not depend upon the act of the owner of the land in which the new bed has been forged, for natural causes brought the river on that land. The right to fish in the new channel does not also arise from the omission or abstention of owner of that land, for by the irresistible force of the current the river forged its new bed and brought the river on to it.

Two cases have been cited before us by the learned Assistant Government pleader to support his contention that by the acquisition under the Land Acquisition Act, the land vested absolutely in the Government free from every right and interest therein, of whatever description, possessed by the former proprietor or by other persons. They are 3 W. R. 27¹⁰ and 14 W. R. 72 Cr.¹¹ Both those cases concerned a right of way over the acquired land. Both of them proceeded upon the construction of S. 8, Land Acquisition Act of 1857 (6 of 1857). The language of that section is that the land acquired would vest in the Government absolutely “free from other estates, rights, writings and interest.” Those words are very comprehensive. The language of S. 16, Land Acquisition Act of 1894, which governs the case before us is quite different and is more limited. We do not therefore regard these cases as authority for the construction of S. 16, Land Acquisition Act of 1894. We accordingly hold that the defendants’ right to fish in the disputed pool of water is still subsisting. In view of the frame of the suit and the prayers made therein the suit would fail on the conclusions we have arrived above. We however notice two further contentions. The first is, whether the contesting defendants have only eight annas share in the fishery in the river Jhinai. The evidence on the record indicates that the defendants’ predecessors had the entire sixteen annas. In 1862 Government attempted to resume eight annas share of the fishery. The robakary (Ex. K) shows that the resumption proceedings were dropped on the ground that the defendants’ predecessors were possessing the fishery on the basis of a grant from the Crown. The lower Courts have misconstrued the said robakari. As the point is not material we do not record a definite finding to the effect that the defendants have 16 annas

5. (’90) 17 Cal. 963, Tarini Charan v. Watson & Co.

6. (’33) 20 A. I. R. 1933 Cal. 615 : 37 C. W. N. 442, Lalit Mohan v. Kali Mohan.

7. (’72) 17 W.R. 73, Mohinee Mohun v. Khajah Assanoollah.

8. (’71) 15 W. R. 212, Chunder Jaleah v. Ram Chandra.

9. (’43) 30 A.I.R. 1943 Cal. 128 : 47 C.W.N. 130, B. B. Rly. v. Nrisingha Charan.

10. (1865) 3 W. R. 27, Collector of 24-Parganas v. Nobin Chunder.

11. (’70) 14 W.R. 72 Cr., In re H. B. Fenwick.

right, but leave the question open. The second point is whether the Governor-General in Council can maintain the suit. The suit was filed in the name of the Secretary of State for India in Council before the Government of India Act, 1935, had come into force. After Part 3 of that Act had come into force an application for amendment of the plaint was made and allowed. By it the Governor-General in Council was substituted in the place of the Secretary of State for India in Council. That application for amendment was a misconceived one, for by S. 179 (2), Government of India Act, 1935, the Secretary of State for India became automatically substituted in the place of the Secretary of State for India in Council.

Besides by Notification No. 1703w published in the Extraordinary issue of the Gazette of India of 1st July 1937, the Governor-General in Council, certified under S. 172 (a), Government of India Act, 1935, that the lands in suit which lie between miles 2 to 4 of the Singjani-Fulchari extension of the Eastern Bengal Railway was retained by the Governor-General in Council. A territorial fishery would be covered by the word "land" used in S. 172, and here the plaintiff claims the pool of water as a territorial fishery. The Governor-General in Council was accordingly competent to maintain the suit. The result is that this appeal is allowed. The suit is dismissed with costs to the contesting defendants respondents throughout. We certify under S. 205, Government of India Act, 1935, that the case involves a substantial question of law as to the interpretation of the Government of India Act, 1935.

DERBYSHIRE C. J. AND LODGE J.

Keshabdeo v. Emperor.

Cri. Revn. Case No. 529 of 1943, D/- 14-1-1944.

Defence of India Rules (1939), R. 81 (2)(b)—R. 81 (2)(b) is not invalid. [P 318 C 2]

DERBYSHIRE C. J.—On 8th June 1943, Keshabdeo Harlalka was convicted by Mr. J. Ahmad, Additional Chief Presidency Magistrate of Calcutta of an offence under R. 81 (4) of the Defence of India Rules and sentenced to undergo rigorous imprisonment for six months. The offence, the facts of which are not denied, consisted of selling to Messrs. A. Firpo, Ltd. of Calcutta, 200 bags of sugar at the rate of Rs. 25 per maund instead of Rs. 13-8-0 per maund. Rs. 13-8-0 per maund was the price fixed by Mr. M. K. Kirpalani, Chief Controller of Prices, Bengal, under the powers given him by R. 81 (2) (b) of the Defence of India Rules, the date of the Price Control Order being 15th June 1942. Messrs. A. Firpo, Ltd. who were confectioners, required the sugar and were quoted the rate charged, and after getting in touch with the police agreed to pay the price demanded. The price was paid in the following way. A cheque for Rs. 7425 representing the sum payable at the controlled rate for the sugar and currency notes amounting to Rs. 6325 representing the excess over the controlled price. When the sale was completed and the money handed over, the police who were in waiting arrested Harlalka and he was charged with this offence and convicted as stated. On 21st June 1943, this Court issued a rule on the Chief Presidency Magistrate to show cause why the conviction and sentence complained of should not be set aside. Before us the facts are not disputed, but a point is taken that the conviction is invalid because the rules made under the Defence of India Act are themselves invalid. The argument which has been put forward is that the rules are made by the Central Government under powers given to them by the Legislature under the Defence of India Act and those powers have been given in such a way that the Legislature has divested itself of its legislative powers and left them to be exercised by the Central Government, and that that handing over of legislative powers is contrary to the Government of India Act, 1935.

The Central Government after the outbreak of war

and the proclamation of an emergency had power to make laws which dealt with not only matters usually dealt with by the Central Legislature but by the Provincial Legislatures. It must be remembered that on the outbreak of the war a Defence of India Ordinance was passed and that later on 29th September 1939 the Defence of India Act (Act 35 of 1939) was passed in supersession of the Ordinance. Section 2, Defence of India Act provides: "(1) The Central Government may, by notification in the official Gazette, make such rules as appear to it to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community. (2) Without prejudice to the generality of the powers conferred by sub-s. (1), the rules may provide for, or may empower any authority to make orders providing for all or any of the following matters," and amongst them in particular: "(xx) The control of agriculture, trade or industry for the purpose of regulating or increasing the supply of, and the obtaining of information with regard to, articles or things of any description whatsoever which can be used in connexion with the conduct of war or for maintaining supplies and services essential to the life of the community." Section 3 provides: "Any rule made under S. 2 and any order made under any such rules, shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act."

Under those rules the Central Government, that is to say the Governor-General in Council, made R. 81 (2) which provides: "The Central Government or the Provincial Government, so far as appears to it to be necessary or expedient for securing the defence of British India or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, may by order provide . . . (b) for controlling the prices or rates at which articles or things of any description whatsoever may be sold or hired and for relaxing any maximum or minimum limits otherwise imposed on such prices or rates." As I have said it is under R. 81 (2) (b) that the order in question limiting the price of sugar to Rs. 13-8-0 per maund was made. It is not contended that Mr. Kirpalani, Chief Controller of Prices, Bengal, in making that order had not the due authority for making it as a person or official. It is not contended that the rule under which the order was made went beyond the powers given by the Defence of India Act. It is contended that the Legislature in enacting sub-s. (2), Defence of India Act and in giving powers to the Governor-General in Council to make rules dealing with the matters mentioned was abdicating its authority and handing over legislative functions given to it by the Government of India Act to someone else. It is now more than four years since the Act was passed and the rules in question made. Many orders have been made under the rules, but as far as I am aware this is the first occasion on which it has been contended that the Act itself is not binding or valid.

In modern warfare where transport and means of communication are extraordinarily rapid the effects of the war may penetrate into localities far away from the fighting and have serious effects there in a very short time and experience has taught that legislation must be ready and available to deal with situation that may arise. The situations that may arise may be different in different parts and at different times. It was found in England in the last war and in India in the last war that legislation by rule under an Act is the most convenient way of dealing with those situations. It was realised that in this war when events have moved much more rapidly legislation by rule was more necessary than in the last war however many objections there might be to it. Shortly before the outbreak of war in England there was passed on 24th August 1939, the Emergency Powers (Defence) Act, 1939, S. 1 of which provides as follows:

"(1) Subject to the provisions of this section, His Majesty may, by Order in Council, make such Regulations (in this Act referred to as 'Defence Regulations') as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order, and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community." Under that provision a very large body of Orders in Council and orders made pursuant to Orders in Council were made for the defence of Great Britain including, in particular, orders for the control of the price and proper distribution of food. It will be noticed that S. 2, Defence of India Act, and S.1, English Emergency Powers (Defence) Act, 1939, contain words identical as far as they are relevant "for maintaining supplies and services essential to the life of the community." Section 2, Defence of India Act, provides for the Governor-General in Council to make such orders as to him may be necessary or expedient.

Section 2 (2) goes into a little more detail and says that "without prejudice to the generality of the powers conferred by sub-s. (1), the rules may provide for and empower any authority to make orders" dealing with amongst others "the control . . . or maintaining supplies and services essential to the life of the community." Rule 81 (2) of the orders in question carries out the purposes of that. It is said that it was never intended that the Indian Legislature should act in the way it has acted. That argument is a little difficult to follow when it is remembered that its powers were derived from an Act of Parliament which same Parliament has acted in the way described which is exactly similar to the way in which the Indian Legislature has acted. It is then said "yes, but the Imperial Parliament does not act under a special instrument which gives it powers and that makes the difference; it is not within the powers of the Indian Legislature to do what the British Parliament did, namely, to delegate its legislative powers to someone else to carry out." The answer to that is contained in a judgment of Lord Atkin in the Privy Council case in (1938) A. C. 708.¹ There an Act of the State of British Columbia called the Natural Products Marketing (British Columbia) Act, 1936, was passed. The scheme of the Act was to enable the Lieutenant-Governor in Council to set up a Central British Columbia Marketing Board to establish or approve schemes for the control and regulation within the Province of the transportation, packing, storage and marketing of any natural products, to constitute Marketing Boards to administer such schemes, and to vest in those Boards any powers considered necessary or advisable to exercise those functions. It was contended that it was not within the powers of the Legislature of British Columbia to invest the Lieutenant-Governor in Council with those powers. The matter eventually went before the Privy Council on that and other matters. At p. 722 Lord Atkin deals with this matter and says:

"The third objection is that it is not within the powers of the Provincial Legislature to delegate so-called legislative powers to the Lieutenant-Governor in Council, or to give him powers of further delegation. This objection appears to their Lordships subversive of the rights which the Provincial Legislature enjoys while dealing with matters falling within the classes of subjects in relation to which the constitution has granted legislative powers. Within its appointed sphere the Provincial Legislature is as supreme as any other Parliament; and it is unnecessary to try to enumerate the innumerable occasions on which Legislatures, Provincial, Dominion and Imperial, have entrusted various persons and bodies with similar powers to those contained in this Act. Martin C. J. appears to have disposed of this objection very satisfactorily in his judgment on the reference, and their Lordships find no occasion to add to what he there said." In the case in question Martin C. J. relied on an earlier case in the Privy Council, (1883) 9 A. C. 117² and cited the passages from that judgment

1. ('39) 26 A. I. R. 1939 P. C. 36 : 1938 A. C. 708, *Shannon v. Lower Mainland Dairy Products Board*.
2. (1883) 9 A. C. 117, *Hodge v. The Queen*.

in favour of the view that he took, and their Lordships of the Privy Council as late as 1938 by affirming the judgment of Martin C. J. reaffirmed their own earlier judgment of 1883. Whatever may be the objections to the practice of delegating legislation, and legislating by rule, the practice is too firmly established and has received judicial recognition too often to be upset now, provided always that the legislation is within the powers given.

It was said further in argument that R. 81 (4), Defence of India Rules by prescribing penalties was going beyond the powers that the Act had given to the Governor-General in Council. The answer to that argument is contained in (1883) 9 A. C. 117² where their Lordships said "their Lordships do not think it necessary to pursue this subject further, save to add that, if by-laws or resolutions are warranted, power to enforce them seems necessary and equally lawful." In my opinion, there is no substance in the contentions that have been put forward in this matter. They have all been dealt with in other cases previously. They have come rather late in the day and have come only when some persons attempting to make a big profit out of the needs of the community has found himself within the grip of the law. He then contends that the Legislature is wrong. That argument has no substance and must fail. In my view this rule must be discharged. The applicant must surrender to his bail forthwith and serve out the sentence. Certificate under S. 205, Government of India Act, is refused.

LODGE J.—I agree.

B. K. MUKHERJEA AND BLANK JJ.

Baidyanath Dutt v. Mritunjay.

Civ. Rule No. 1430 of 1941, D/- 19-5-1942.

Bengal Money-Lenders Act (10 of 1940), S. 36 (1) Proviso (i)—"Suit by parties" explained—Application under S. 36 in execution — Execution proceeding is not "suit" within proviso — Original suit is "suit by parties" within proviso. [P 319 C 1]

ORDER.— This rule is directed against an order made by the learned Subordinate Judge of Birbhum rejecting an application of the petitioner for the reopening of a decree under S. 36, Bengal Money-lenders Act. It is not necessary for us to reiterate the facts which have been stated with elaborate fulness in the judgment of the learned Subordinate Judge. The learned Subordinate Judge is of opinion that the petitioner would have been entitled to the relief claimed but for the fact that the case was hit by proviso (1) to S. 36, Bengal Money-Lenders Act, which precludes a Court from re-opening any adjustment or agreement purporting to close previous terms which were entered into by the parties more than 12 years from the date of the suit. The whole controversy centres round the point as to what is the date of the suit in the present case. It appears from the records that the mortgage bond in adjustment of previous claims of the parties was executed by the petitioners in favour of opposite party 1 on 20th October 1925, and it purported to be for a consideration of 21 thousand rupees. Upon this, a suit was instituted by the mortgagee in 1932 which culminated in a compromise decree on 28th July 1934. The execution case in connexion with this decree which is still pending, was started on 5th December 1938. The learned Subordinate Judge took the date of filing of this execution petition to be the date of the suit for the purpose of proviso (1) attached to S. 36 and as the mortgage bond of 1925 was beyond 12 years from this date he refused to re-open the decree.

In our opinion, the view taken by the learned Subordinate Judge is not correct. Proviso (1) to S. 36, Bengal Money-Lenders Act provides that in the exercise of the powers, the Court shall not "(1) reopen any adjustment or agreement purporting to close previous dealings and to create new obligations which has been entered into on a date more than 12 years prior to the date of the suit by the parties or any person through whom they claim."

The suit mentioned in this proviso must mean the suit that is spoken of in sub-s. (1) of the section, i. e., to say it must be either a suit to which this Act applies and in which relief has been claimed by the borrower or it may mean the suit that is instituted under sub-s. (1) of S. 36 itself. In the present case there is no suit instituted under S. 36 (1), Bengal Money-Lenders Act, and the application was made during execution proceedings under S. 36 (6) (a) (i) of the Act. The suit, therefore, must refer to the suit to which the Act applies and the decree made in which is sought to be opened. This in our opinion cannot but be the mortgage suit itself which was instituted in the year 1932. Under S. 2 (22), Bengal Money-Lenders Act, a suit to which this Act applies means any suit or proceeding which is instituted or is pending on or after the 1st day of January 1939 and it includes a proceeding in execution. If a proceeding in execution of decree is pending on or after the 1st day of January 1939 the suit in which the decree was passed would be a suit to which the Act applies in accordance with S. 2 (22) of the Act but the execution proceeding itself could not be regarded as a suit, for in that case the Court would have to reopen a decree that is made in such execution proceeding which is absurd. The language of the Act is not happy but that is the only reasonable interpretation which we can put on that section. As the mortgage bond of 1925 was within 12 years from the date of the mortgage suit, we think that the decree made in the mortgage suit may be reopened under the provision of S. 36 (6) (a) (i), Bengal Money-Lenders Act.

It must be noted in this connexion that the petitioner was not right in saying that the real consideration for this mortgage bond of 1925 was Rs. 11,800 only. As a matter of fact there was a mortgage deed for Rs. 27,400 executed on 27th September 1909 which was beyond 12 years from the date of the mortgage suit and this was a joint mortgage bond executed by the petitioner in favour of opposite party 1 and his brother. This mortgage bond could not, in our opinion, be re-opened. This is a matter, however, which has to be considered by the Court in taking accounts between the parties and making a new decree. The result, therefore, is that we make this rule absolute and set aside the order of the learned Subordinate Judge. This matter will go back to the trial Court who will reopen the decree and make a new decree in accordance with the directions given above. Mr. Apurba Charan Mukherji has raised a point that unless Nrityagopal, the brother of opposite party 1 who was a party to the mortgage dated 27th September 1909, is made a party to this proceeding, the accounts could not properly be reopened. This is a matter which will also be considered by the trial Court and if necessary, Nritya Gopal may be made a party to this proceeding. We make no order as to costs.

HENDERSON J.

Golam Mahiuddin v. Hrishikesh.

Appeal No. 1159 of 1942, D/- 23-2-1943.

(a) Bengal Money-Lenders Act (10 of 1940), S. 36 (6) — Review allowed — New decree passed — On appeal original decree restored — Second appeal lies against appellate decision. [P 319 C 2]

(b) Bengal Money-Lenders Act (10 of 1940), S. 36 (1) and 2 (22) — Title suit by decree-holder held not one to which Act applied within S. 2 (22) and was not one to recover loan within S. 36 (1). [P 319 C 2]

JUDGMENT. — This appeal is by the judgment-debtor and arises in connexion with an application for review filed by the appellant under the provisions of S. 36 (6), Bengal Money-Lenders Act. As there was some doubt as to the competency of the appeal there is an alternative application in revision. My own view is that the appeal is competent and that has not been challenged on behalf of the decree-holder. The position is this : It is now well-settled that, if the application of the petitioner had been rejected by the Munsif, the

remedy would have been by way of revision. The application was, however, successful. The decree was reopened and a new decree was passed. It is also well-settled that the respondent was entitled to appeal against the new decree. He did so with the result that the new decree was set aside and the original decree has been restored. Certainly the practical effect of that is that the original application has been rejected. The lower appellate Court, however, has done really more than reject an application for review but has set aside a decree within the meaning of the Code of Civil Procedure. On this view a second appeal is competent.

Now when the appellant filed his application he had a good case, because he relied upon the decision of Edgley J. in 45 C. W. N. 859.¹ In view of that decision all that he had to show was that the decretal amount was not paid in full. As I felt unable to follow this decision I referred the matter to a Division Bench with the result that the decision has been overruled. On this view the learned Judge set aside the decision of the Munsif. This being the position the appellant's case is quite hopeless unless he can rely upon a certain title suit which was filed after 1st January 1939. Part of the mortgaged property was purchased in execution by the decree-holder. The sale was confirmed on 25th September 1935 and delivery of possession was taken on 10th March 1936. A title suit was instituted on the allegation that the decree-holder was subsequently dispossessed and the relief prayed for was a declaration of his title and delivery of possession.

It would obviously be impossible to fit this suit into the definition of a "suit to which the Act applies" in S. 2 (22) wide though that definition undoubtedly is. It was however argued by Mr. Farhat Ali that S. 36 applies to that suit in view of the provisions of sub-s. (4). That sub-section applies the main provision to any suit, whatever its form may be, if such a suit is substantially one for the recovery of a loan or for the enforcement of any agreement. The appellant made the usual application under O. 21, R. 90 and that application was fought up to this Court in revision. There was then what is a common form of settlement i. e., it was agreed that, if a certain sum was paid within a certain time, the sale would be set aside. The title suit obviously is not a suit to recover the loan. If the decree-holder loses the suit, he will lose both the land and his money. If it were a suit for the enforcement of the agreement, the appellant would have been the plaintiff instead of the defendant.

There was some discussion as to whether the decree-holder really took delivery of possession. The Courts below appear to have differed on this point. It is suggested that the title suit was a mere dodge to evade the provisions of the Money-Lenders Act. As that Act was not even in force when the suit was instituted, I am unable to see how that suit can be a dodge to evade its provisions. Suffice it to say that, if the appellant's suit with regard to possession is true, the suit will be dismissed on the merits. The appeal is dismissed ; but as the appellant had a good case in view of the decision of Edgley J. when he filed the application, I make no order as to costs in this appeal. Leave to appeal under Cl. 15, Letters Patent is refused. No order is necessary on the application.

I. ('42) 29 A.I.R. 1942 Cal. 121 : 45 C. W. N. 859, Suresh Chandra v. Lal Mohan.

EDGLEY J.

Sushil Chandra v. Emperor.

Criminal Revn. No. 1002 of 1942, D/- 18-2-1943.

Criminal P. C. (1898), Ss. 256 (1) and 537 — Accused represented by pleader — Witnesses cross-examined forthwith — No reasons recorded by Magistrate — Irregularity to observe S. 256(1) is curable under S. 537. [P 320 C 1]

ORDER. — The petitioners in this case were convicted on a summary trial of an offence under S. 323, Penal Code. The main point which has been urged by

the learned advocate for the petitioners is that the conviction should be set aside and a retrial ordered owing to the failure on the part of the learned Magistrate to comply with the provisions of S. 256 (1), Criminal P. C. Admittedly, the witnesses for the prosecution were cross-examined immediately after their evidence-in-chief had been taken on 22nd August 1942. No adjournment was granted as contemplated by S. 256 (1) of the Code, nor did the learned Magistrate record any reasons in writing for having the witnesses cross-examined forthwith. At the same time, the petitioners were represented by a pleader at the trial and no objection appears to have been raised to the procedure which was adopted by the learned Magistrate.

It is argued by the learned advocate that this defect of procedure cannot be treated as a mere irregularity and, in support of his contention, he has referred me to a decision of the Madras High Court in 28 Cr. L. J. 121 in which Jackson J. made certain observations to the effect that failure to comply with the provisions of S. 256 (1), Criminal P. C., cannot be regarded as an irregularity curable under S. 537 of the Code. In that case, however, it appears that the accused person was probably prejudiced on account of the failure on the part of the Magistrate strictly to observe the provisions of S. 256 (1) of the Code, as he was not represented by a pleader, if Jackson J. intended to lay down a rule of general application that in all cases of non-compliance with S. 256 (1) of the Code, S. 537 of the Code has no application I must respectfully dissent from him. Section 537 provides that "no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chap. 27 or on appeal, or revision on account—(a) of any error, omission or irregularity in . . . proceedings under this Code . . . (d) unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice."

The explanation goes on to state that: "In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceeding." It seems to me that, in view of the language which has been used by the Legislature, it is precisely in a case such as that with which we are now dealing that S. 537 should be applied. The petitioners were represented by a pleader on 22nd August 1942 and this pleader appears to have cross-examined the prosecution witnesses at length. If he had felt any difficulty in doing so he could easily have recorded an objection on that day but he does not appear to have done so. This being the case, I am not prepared to interfere with the decision of the learned Magistrate and this rule must be discharged.

1. ('27) 14 A. I. R. 1927 Mad. 78 : 28 Cr. L. J. 12, In re Raju Achari.

R. C. MITTER AND AKRAM JJ.

Jadu Nath v. Jagat Prasanna.

Appeal No. 130 of 1942, D/- 3-5-1944.

(a) Bengal Money-Lenders Act (10 of 1940), Ss. 36(1) Proviso (i) and 38 — S. 36 (1) together with proviso (i) is applicable to a proceeding under S. 38. [P 321 C 1]

(b) Bengal Money-Lenders Act (10 of 1940), Ss. 36(1) Proviso (i) and 38—"Purporting to create new obligations"—Original obligation must be completely superseded and new obligation substituted—Mere taking of accounts is not enough—Proviso will not apply if the original mortgage is kept alive and only some of its terms are modified. [P 321 C 2]

(c) Bengal Money-Lenders Act (10 of 1940), S. 38 — No provision of compound interest—Interest added to principal and borrower agreeing to pay interest on it—New obligation is created. [P 321 C 2]

JUDGMENT. — The father of the respondents Rai Bahadur Girija Prossono Mukherjee borrowed on 24th October 1916 from the appellants' predecessors-in-title,

Rai Bahadur Janaki Nath and Sita Nath Roy a sum of Rs. 3,15,000. To secure the sum of Rs. 3,00,000 he executed a mortgage bond (Ex. A) on that date in favour of the lenders. The mortgage comprised five items of property. Two of those were situate in Calcutta — one in Masjidbari Street and the other in Elgin Road being premises No. 5 of that street, and the remaining three were mufassil properties. Interest stipulated for was at the rate of 7 per cent. per annum (compound) with quarterly rests. The due date for repayment was 24th October 1919. The remaining sum of Rs. 15,000 was secured by a deed of further charge (Ex. B) executed on the same date which secured the self same properties. The stipulation for interest was the same as in the mortgage bond, but the due date of repayment was 24th October 1917.

The mortgagor, Girija Prossono, died in June 1918. On his death his estate devolved upon his sons, Jagat Prossono and Sailaja Prossono who, being wards of Court are the respondents to the appeal represented by the Manager, Court of Wards, Gobordanga estate. One of the mortgagees, Sita Nath, died in April 1920, and his two sons, Jadu Nath and Priya Nath, along with the heirs of the other mortgagee, Raja Janaki Nath who died shortly before the commencement of these proceedings in the Court below, are the appellants. In consideration of the mortgagees giving them time to repay the loan Jagat Prossono and Sailaja Prossono executed a registered agreement in favour of the former on 2nd July 1920 (Ex. C) by which they covenanted to repay the mortgage money and the money secured by the deed of further charge at an enhanced rate of interest (7 3/4 per cent. compound, with quarterly rests) the mortgagees undertaking not to call in their dues before 31st December 1921. By a further registered instrument (Ex. D) they agreed to pay the dues of the lenders at a further enhanced rate of interest, 10 per cent., compound, with quarterly rests in consideration of the lenders undertaking not to call in their dues before 31st May 1923.

On 4th July 1923, Jagat Prossono and Sailaja Prossono were declared disqualified proprietors by a notification issued under the Bengal Court of Wards Act and the Court of Wards assumed management of their estate. By a verbal agreement between the lenders and the manager, Court of Wards, dated 18th May 1924, the lenders agreed to reduce the rate of interest from 10 per cent. as provided for in Ex. D to 8 per cent. Before 25th February 1928 the mortgaged property situate in Masjidbari Street in the town of Calcutta was sold by the mortgagors with the concurrence of the mortgagees who released their security on it. This follows from the recitals of Ex. F, a registered instrument executed by the parties on 25th February 1928. This is an important document in the case. On that date the mortgagors sold to the mortgagees for a sum of Rs. 1,17,000 premises No. 5, Elgin Road. Out of this sum Rs. 27,000 was paid by the mortgagee purchasers to the mortgagor vendors in cash and the balance, Rs. 90,000 was applied by the former in reduction of their claims under the mortgage bond and the deed of further charge. By this all their dues on the deed of further charge and all the arrears of interest due on the mortgage up to that date were wiped off.

It is admitted by the mortgagees that a total sum of Rs. 3,18,739-11-6 had been paid by the mortgagors on different dates up to 25th February 1928 as interest on the sum of Rs. 3,00,000 which had been secured by mortgage Ex. A. The agreement, Ex. F, recited the previous agreements by which the rate of interest had been changed from time to time and the date of repayment had been extended. It also recited the sale of premises No. 5, Elgin Road to the mortgagees and the manner in which its price had been applied. It then stated that sum of Rupees three lacs was then due on the mortgage (Ex. A) dated 24th October 1916 and that the security then consisted of the properties mentioned in that mortgage deed (Ex. A) save and except No. 5

Elgin Road and the Musjidbari Street property which had been sold before. The rate of interest was reduced to 7½ per cent., compound, with half yearly rests and the mortgagors covenanted to pay the said sum of rupees three lacs "due and outstanding on the said mortgage," (Ex. A) with interest at that rate on or before 24th February 1929. The agreement by express terms preserved all the other terms and conditions of the mortgage deed of 24th October 1916. This agreement was stamped with a stamp of annas twelve only. After the execution of this agreement the mortgagors made further payments. It is admitted that the mortgagors had paid a total sum of Rs. 4,82,035-4-3 on the said mortgage (Ex. A) from its date till 30th August 1941 when they filed an application under S. 38, Bengal Money-Lenders Act (10 of 1940). The learned Subordinate Judge passed his order on the said application on 24th February 1942. He declared that a sum of Rs. 1,17,964-11-9 only was due to the mortgagees. Against the said order the mortgagees have preferred this appeal.

It cannot be disputed, and that fact is also admitted by the appellants' advocate, that the learned Subordinate Judge's order would be right, if the Court can go behind the adjustment and agreement as embodied in Ex. F. He however contends that that document cannot be touched and so accounts must be taken on the footing that rupees three lacs was the outstanding principal of the loan on the date of that document. In support of his contention he contends that Ex. F is protected by reason of proviso (i) to S. 36 (1), Bengal Money-Lenders Act. The respondents' advocate contends that (i) that proviso is not applicable to a proceeding under S. 38 of the Act, and (ii) in any event that document Ex. F does not come within the terms of the said proviso. We do not accept the first contention of the respondents' advocate and hold that that S. 36 (1) together with that proviso is applicable to a proceeding under S. 38 of the Act for the reasons which we have given in our judgment delivered on 28th March in First Appeal No. 199 of 1941. We, however, agree with his second contention. Section 36 (1) (a) empowers the Court to reopen any transaction between the lender and the borrower and to take an account between them and notwithstanding any agreement purporting to close previous dealings and to create new obligations, to reopen any account already taken. The proviso is that any adjustment or agreement purporting to close previous dealings and to create new obligations cannot be reopened if it is more than 12 years anterior to the date mentioned in that proviso, which, in the case before us is 30th August 1941, the date when the borrowers made the application under S. 38 of the Act. We will have to see if Ex. F (which is beyond 12 years of that date) is an adjustment or agreement which purports to close previous dealings and to create new obligations. It is clear that mere taking of accounts is not enough to attract the proviso. The adjustment must close previous dealings and create new obligations. Nor would a mere agreement to pay on the basis of the original obligation what is found to be the amount due on the taking of accounts be enough to attract that proviso, for the reason that it would not create new obligations. To bring Ex. F within the proviso the learned advocate for the appellants contends that it amounts to a fresh mortgage. We cannot accept that contention. That document does not extinguish the mortgage (Ex. A) of 24th October 1916. That is kept alive, only some of its terms are modified. The parties state that rupees three lacs was due "thereunder" and that "now" the zamindaries, etc., set out in the schedule were included in that mortgage (Ex. A) as No. 5 Elgin Road and the Musjidbari Street property had been released from the mortgage by the consent of the mortgagees. The deed expressly provides that all other terms of that mortgage deed (Ex. A) save and except those which were expressly modified by Ex. F, shall continue to be operative.

There is no transfer of an interest in the immovable
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properties mentioned in the schedule, which is essential for a mortgage in view of S. 58, Transfer of Property Act, and document is not stamped with stamps of the value that would be required for mortgage for rupees three lacs, but is stamped with a stamp necessary for an agreement. Moreover the memoranda of agreement beginning with Ex. C dated 2nd July 1920 and ending with Ex. G dated 5th October 1937, which was executed long after Ex. F form a series and have to be considered together. The last mentioned document makes it quite clear that even in 1937 the parties proceed on the footing that the mortgage created by Ex. A was still alive and ruled the field but only with some of its terms modified. We hold that the phrase "purporting to create new obligations" used in the proviso cover only the case where original obligation undertaken by the borrower at the time of the loan is completely superseded and a substituted obligation created. Any other interpretation would defeat the object of the Act. By Ex. F the past accounts were no doubt closed but the security and the obligation created by the mortgage Ex. A was continued, not extinguished and substituted. By that document a new obligation was not created. The learned advocate for the appellant has drawn our attention to the decision of the Judicial Committee in A.I.R. 1940 P.C. 60,¹ a case from the Federated Malay States. Their Lordships of the Judicial Committee had to consider the effect of the Usurious Loans Statute in force there.

The provisions of the statute which were relevant in that case were that if the Court had reason to believe that interest was excessive, or the transaction between the parties was substantially unfair it may (1) re-open a transaction, take accounts and relieve the debtor of all liability of excessive interest and (2) notwithstanding any agreement purporting to close previous dealings and to create a new obligation, re-open any account. Their Lordships held that 24 per cent. interest was excessive interest but there was nothing unfair in a transaction by which arrears of interest was capitalised. That case therefore does not touch the question which we have before us. There was no occasion to consider a provision similar to proviso (i), Bengal Money-Lenders Act. Where in the agreement on the basis of which the original loan was given does not contain a stipulation for compound interest but later on the arrears of interest on the loan is by agreement between the parties added to the principal then outstanding and the borrower agrees to pay interest on it on the footing that it is to be the principal this new transaction is certainly one which creates a new obligation for it creates a completely substituted obligation on the closing of the previous dealings and so would come within the proviso, but the case before us is not of that type. On the view we take of Ex. F the mortgagees cannot get in excess of what is provided for in S. 30 (1) (a) of the Act. As the principal of the original loan, what was actually advanced, was Rs. 3,00,000, the mortgagees cannot get more than Rs. 3,00,000 as interest. As Rs. 4,82,035-4-3 had been paid by the borrowers Rs. 1,82,035-4-3 must be credited towards the principal and so the mortgagees cannot recover more than Rs. 1,17,964-11-9 no matter on what date they may bring their suit for enforcement of the mortgage. We accordingly affirm the order of the learned Subordinate Judge and dismiss the appeal with costs. Hearing-fee is assessed at ten gold mohurs.

1. (1940) 27 A.I.R. 1940 P. C. 60, Chethambaram Chettiar v. Loo Than Poo.

HENDERSON J.

Kalachand Shaw v. Ramani Mohan.

Appeal No. 272 of 1943, D/- 2-5-1944.

Calcutta House Rent Control Order (1943), S. 11 — Application to vary decree refused — No appeal lies.
[P 322 C 1]

JUDGMENT. — This appeal is directed against an order of the Munsif refusing to vary a decree under the provisions of S. 11, Calcutta House Rent Control Order, 1943. A preliminary question arises as to the competency of the appeal. This is not an objection under S. 47, Civil P. C. It is an application asking for a variation in the decree. No doubt if the Munsif had allowed the application, the varied decree might have been appealable as a decree; but he has merely rejected it. I am therefore of the opinion that the appeal is not competent. It therefore remains to consider whether I should interfere in revision. Appellant 1 is the judgment-debtor against whom the decree for ejectment has been passed. He constructed a hut on the land. Appellant 2 is said to be a sub-tenant of some of the rooms. Before the Munsif could make an order varying the decree, he would have to be of opinion that the decree would not have been passed if this order had been in operation at the time. The Courts below were obviously right when they said that in view of the definition of "house" in the order, appellant 1 was not in a position to get any help. Appellant 2 is not a party to the decree at all. He could therefore only make the application if he were willing to admit that as an under-tenant of appellant 1 he is liable to be ejected in execution of the decree obtained against appellant 1. Mr. Ghose has made that admission on his behalf. As against the decree-holder his case is no better than that of defendant 1. If his case was true, he might have been able to plead the order in a suit for ejectment brought against him by appellant 1. It could not however possibly be said that he holds rooms in this hut under the decree-holder. The appeal is dismissed as incompetent and there is nothing in the case which would justify me in interfering in revision. I make no order as to costs.

RAU AND BISWAS JJ.

Atul Krishna v. Amrita Lal.

Appeals Nos. 174 and 239 of 1941, D/- 23-2-1943.

(a) Bengal Money-Lenders Act (10 of 1940), S. 31 — Interpretation — Mortgage bond specifically providing for payment of interest till realisation of entire amount — Interest can be awarded up to date of payment.

[P 322 C 2; P 323 C 1]

(b) Bengal Money-Lenders Act (10 of 1940), S. 31 — Agreement for interest is unaffected by S. 31.

[P 323 C 1]

(c) Bengal Money-Lenders Act (10 of 1940), S. 31 — Decretal amount — Preliminary decree — Judgment-debtor given period of grace for redemption — Total amount of additional payments for time allowed is not decretal amount.

[P 323 C 1]

(d) Bengal Money-Lenders Act (10 of 1940), S. 31 (a) — Interest on any portion of decretal amount is prohibited.

[P 323 C 1]

JUDGMENT. — These appeals arise out of a mortgage suit brought by the appellants on 16th July 1937, against the respondent. The mortgage loan was Rs. 15,500; the date of the loan was 13th August 1934; the rate of interest in the bond was nine per cent. per annum. There was an ex parte preliminary decree on 28th February 1938; this was set aside, on the application of the respondent, and another ex parte preliminary decree was made on 7th September 1938; this also was subsequently set aside, and a third ex parte preliminary decree was made on 1st March 1939. This was followed by a final decree on 24th April 1939, in execution of which the mortgaged property was sold to the decree-holders on 15th May 1940. Before the date fixed for confirmation of the sale, the respondent took various other proceedings which need not be recapitulated here. Ultimately, on 4th June 1941, the Subordinate Judge reopened the decree under S. 36, Bengal Money-Lenders Act, 1940 and passed a new decree "for the principal sum of Rs. 15,500, with 8 per cent. per

annum simple interest, from the date of the bond till the institution of the suit and proportionate costs." The respondent was allowed to pay in five equal annual instalments commencing in January 1942. The sale of 15th May 1940 was cancelled.

One of these appeals (No. 174 of 1941) is against the new decree and the other (No. 239 of 1941) against the order re-opening the old decree. The appellants, however, do not press the latter appeal (which we accordingly dismiss hereby) and they raise only one point in the former, namely, as to the amount allowed as interest. No objection is taken to the rate of interest having been reduced to 8 per cent. per annum, as required by S. 30, Bengal Money-Lenders Act, 1940, or to the instalments allowed under S. 34 of the Act. The only objection is as to the period for which interest has been allowed. The material portion of the decree runs: "It is hereby declared that the amount due to the plaintiffs on the mortgage mentioned in the plaint calculated upto this 16th day of July 1937 is the sum of Rs. 15,500 for principal, the sum of Rs. 3634 for interest on the said principal at 8 per cent. per annum from the date of the bond 13th August 1934 and the sum of Rs. 1448-2-0 for the costs in proportion of the suit awarded to the plaintiff, making in all the sum of Rs. 20,582-2-0." It will thus be seen that the Subordinate Judge has allowed interest only from the date of the bond to 16th July 1937, that is, the date of the suit; no interest has been allowed between the date of the suit and the date of the decree, or for any subsequent period. The Subordinate Judge has given no reason for allowing no interest after the institution of the suit. Indeed, he has commenced his judgment by observing that the judgment-debtor has been guilty of consistent bad faith; obviously, then, if the matter had rested in the Subordinate Judge's discretion, he would have been disposed to exercise it in favour of the plaintiffs and to allow interest. We are therefore driven to infer that he was under the impression that there was some provision in the Bengal Money-Lenders Act, 1940, which debarred the award of any interest after the date of the suit. We have not been able to discover any such provision. Possibly, he had in mind S. 31 of the Act. Clause (a) of which runs: "Notwithstanding anything contained in any law for the time being in force, no Court shall, in any decree passed in any suit to which this Act applies: (a) if the loan to which the decree relates was advanced before the commencement of this Act, allow any interest on the decretal amount."

Now, apart from the fact that this does not prohibit the award of interest upto the date of the decree, — since this would necessarily be included in the decretal amount and would not be interest on that amount — there is a more fundamental consideration. Sections 30 and 34 of the Act both open with the words, "Notwithstanding anything contained in any law for the time being in force or in any agreement"; but in S. 31, which is between these two sections, the non obstante clause does not contain the words "or in any agreement." It can be plausibly argued that the words are, strictly speaking, superfluous even in Ss. 30 and 34; for, either the agreement is enforceable by law (e. g., the Indian Contract Act), or it is not. If it is, the words "Notwithstanding anything contained in any law for the time being in force" would be sufficient to override the law by which the agreement is enforceable and therefore also the agreement itself. If, on the other hand, the agreement is such as is not enforceable by law, it can create no rights or obligations. In either case, therefore, the words "or in any agreement" may be said to be redundant. But the fact that the Legislature has thought it necessary to insert them in Ss. 30 and 34 and has left them out in S. 31 can hardly be treated as being of no significance. It does lead to the inference that S. 31 is not intended to apply where there is an agreement to the contrary. In other words, we must read the opening clause of S. 31 as if it ran, "Notwithstanding anything contained in any law for the time being in force, but subject to the operation of

any agreement." In the present case there is an agreement, namely, the mortgage bond, which specifically provides for the payment of interest at nine per cent. per annum on the principal "till the realization of the entire amount." Of course, the rate of interest stipulated is cut down by S. 30, Bengal Money-Lenders Act, 1940, to 8 per cent. per annum, and the period of the stipulation is cut down by O. 34, R. 11, Civil P. C., so as to end at the date fixed for redemption in the preliminary decree instead of running on "till the realization of the entire amount"; after the date fixed for redemption, the rate of interest allowed by cl. (b) of that Rule is such as the Court deems reasonable. But within these limits the agreement is still effective; and it remains unaffected by S. 31, Bengal Money-Lenders Act, 1940, as we read that section, so that interest on the principal at 8 per cent. per annum remains payable until the date fixed for redemption. After that date, the agreement is superseded by O. 34 R. 11 (b), which, in its turn, is overridden by S. 31, Bengal Money-Lenders Act.

We may now dispose shortly of certain connected points. Subject, as already explained, to the operation of any agreement, there can be no doubt that S. 31, Bengal Money-Lenders Act, 1940, applies to the preliminary decree in a mortgage suit, since it is expressed to apply to any decree in any suit to which the Act applies and S. 2 (22) makes it clear that the Act applies to mortgage suits. We have also no doubt that the term "decretal amount," with reference to such a decree, can only mean the amount found or declared to be due to the plaintiff at the date of the decree under O. 34 R. 2 (1) (a) or (b). That is the whole amount payable under the decree if the judgment-debtor is in a position to pay it at once. If he is given a period of grace for redemption, he has to make additional payments depending to some extent upon the time allowed; the total amount of these additional payments is not entered in the decree, nor can it even be computed at the date of the decree, since the time originally allowed may be subsequently extended. It cannot, therefore, be said to form part of the decretal amount. Section 31 (a), Bengal Money-Lenders Act, 1940, prohibits the award of "any interest on the decretal amount." It seems to us that this necessarily includes a prohibition of interest on any portion of the decretal amount; otherwise the provision could easily be circumvented by disallowing interest on one small item of the amount and allowing it on the others. We think it necessary to state this, because the interest allowed by O. 34 R. 11 (a), Civil P. C., is not on the whole of the amount found or declared due in the preliminary decree, that is to say, not on the whole of the "decretal amount," but on certain items thereof; and the question may, therefore, arise whether it can be said to be "interest on the decretal amount" within the mischief of S. 31, Bengal Money-Lenders Act, 1940. We think that it can, and that it, therefore, falls within the ban of the section, subject, of course, to the operation of any agreement, as already explained. No question can arise with respect of the interest allowed by O. 34 R. 11 (b), Civil P. C., for that falls on all items and is undoubtedly "interest on the decretal amount." The net result is that the appellants are entitled to interest at 8 per cent. per annum on the principal, not only upto the date of the preliminary decree but also upto the dates fixed therein for payments of the several instalments of the decretal amount, the interest between any two successive dates being reckoned on the portion of the principal outstanding between those dates; but the appellants are not entitled to any further interest. The decretal amount declared as due upto the date of the preliminary decree will be payable in five equal annual instalments commencing on 23rd August 1943. We make no order as to costs in this Court in these appeals. The cross-objection is dismissed without costs. [Rest of the judgment is not material for the Report.]

EDGLEY AND SEN JJ.

Emperor v. Rahenuddin Mondal.

Ref. No. 1 and Appeal No. 52 of 1943, D/- 1-3-1943.

(a) Evidence Act (1872), S. 145 — First information report — Statements in, can be used for contradicting informant only on his attention being pointedly drawn to contradictions—Only portions necessary should be put in evidence. [P 325 C 1]

(b) Criminal P. C. (1898), S. 288 — S. 288 is discretionary — Discretion should be sparingly and very carefully used as statement once allowed becomes substantive evidence — It can be used both for corroboration or contradiction — In latter case S. 145, Evidence Act must be observed. [P 325 C 1,2]

(c) Criminal P. C. (1898), S. 162 — First information report — It cannot be used for discrediting witness other than informant as it cannot be used as substantive evidence. [P 324 C 2]

EDGLEY J. — In this case the learned Sessions Judge of Nadia has made a reference to this Court under S. 374, Criminal P. C., in respect of Rahenuddin Mondal who was sentenced to death by him on 20th January 1943. The prisoner had been placed on his trial on a charge of murdering a woman named Sarasi Bala Dasi on or about 30th July 1942. He was found guilty under S. 302, Penal Code, by a majority verdict, five of the jurors holding that he was guilty, while four of them found that he was not guilty. The case for the prosecution was to the effect that, on the day of the occurrence Sarasi Bala Dasi left her house in order to bathe in the Chhota Pagla Beel which was situated at a distance of about three rashis from her residence. While she was on her way she was attacked by the prisoner who cut her throat apparently for the purpose of stealing a gold necklace which she was wearing. At this time a boy named Putiram Biswas who had been ploughing his field near the road witnessed the occurrence and raised the alarm. A number of villagers arrived on the scene and gave chase to the murderer. The chase was a long one and apparently occupied several hours. Finally, Rahenuddin Mondal took refuge in the verandah of the house of Jyotish Haldar where he was arrested. Blood was found on his person and on the cloth which he was wearing. Subsequently, he was taken to the house of Dr. Aswini Pramanik where he was identified by Putiram Biswas. He was arrested in due course and after the usual proceedings before the Committing Magistrate he was placed on his trial before the Sessions Judge of Nadia. (After discussing the evidence His Lordship proceeded.) Our attention has also been called to another minor discrepancy between the testimony of Panchu Gopal Biswas and his statement in the first information report. In the latter document he stated that he and some of his co-villagers saw a man running away through the Singnagar field while they were searching for the murderer. In his evidence he merely states that after he had run a rashi he saw the appellant running ahead. We do not think that any significance can be attached to a discrepancy of this kind. In any case, however, we must point out that, even if it could be said that there were discrepancies of a serious nature between the testimony of the first informant as given in Court and the previous statement made by him in the first information report, it would not be open to the defence to place any reliance on these discrepancies unless there had been a due compliance with the provisions of S. 145, Evidence Act. The first information report is not substantive evidence. It is merely a previous statement which may be proved by the prosecution for the purpose of corroborating the first informant and may be used by the defence for the purpose of contradicting him.

If it is desired to use any statement contained in the first information report for the purpose of contradicting the first informant, it is essential that the attention of the witness should be drawn to those parts of the document, which it is intended to use for the purpose of contradicting him, in order that he may be given an

opportunity to furnish a suitable explanation with regard to the alleged contradiction. This had not been done in the case with which we are now dealing. After the first informant has testified with regard to a particular incident connected with the occurrence the requirements of S. 145, Evidence Act, are not met merely by asking him whether he made some other statement to the police. The attention of the witness must be expressly drawn to the terms of the relevant passage in the other statement and he should be asked whether he has any explanation to offer with regard to any apparent discrepancy. This was not done in the present case with regard to any of the abovementioned discrepancies upon which the defence rely and it follows that, with regard to the evidence of Panchu Gopal Biswas, the appellant was placed in a more favourable position before the jury than that to which he was legally entitled. Further, with reference to this particular witness we find that his deposition before the Committing Magistrate was allowed to be put in by the defence under the provisions of S. 288, Criminal P. C. We find it extremely difficult to understand why this course was adopted as Panchu Gopal Biswas's deposition before the Committing Magistrate seems only to contain at the most two very minor discrepancies. The first is with regard to the depth of the water of the Pagla Beel and the next was on the point whether the appellant questioned the villagers who arrested him as to why they had chased him. If the deposition of this witness be read as a whole, he appears to have told substantially the same story both before the Committing Magistrate and before the Sessions Court. Section 288, Criminal P. C., is in the following terms :

"The evidence of a witness duly recorded in the presence of the accused under Chap. 18 may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provisions of the Indian Evidence Act, 1872." In our view this section confers a discretion on the Judge which should be very carefully and sparingly exercised. The general scheme of the Evidence Act and of the Code of Criminal Procedure with regard to criminal trials is that the evidence for or against an accused person should ordinarily be given in open Court and that the witness should be subjected to cross-examination in the ordinary way with regard to all statements made by him.

If a witness completely resiles from the evidence which he has given before the Committing Magistrate or, if the testimony which he gives at the trial of an accused person is substantially different from that which he has given on some previous occasion it may be necessary for the Judge to exercise his discretion under S. 288, Criminal P. C., for the purpose of bringing the previous statement on the record. In the present case, however, we are of opinion that the learned Judge wrongly exercised his discretion under this particular section. As already pointed out, the testimony of Panchu Gopal Biswas before the Committing Magistrate was substantially the same as that which he gave before the Sessions Court. If it had been considered necessary to contradict him by any statement contained in his previous deposition this should have been done under S. 145, Evidence Act, by observing the procedure to which attention has already been drawn. In any case, however, even if it had been necessary to apply the provisions of S. 288, Criminal P. C., in this case, it would still have been incumbent upon the defence if they wished to contradict Panchu Gopal Biswas by anything contained in his previous deposition to draw his attention to those passages in that deposition by which it was intended to contradict him, inasmuch as S. 288, Criminal P. C., expressly states that this section must be treated as subject to the provisions of the Evidence Act. This is, therefore, another instance in which the appellant appears to have had the benefit of an advantage to which strictly speaking, he was not entitled.

Before leaving the first information report it may also be mentioned that Mr. Talukdar has relied upon certain statements contained in this document for the purpose of discrediting the witnesses other than the first informant. In our view, this is a use to which a document of this nature cannot properly be put. To use the first information report in this way is in effect to treat it as substantive evidence in a case, whereas, as already pointed out, it is merely a previous statement which may be used either for the purpose of corroborating the first informant or for discrediting him, provided the proper procedure is observed. The next three important witnesses are Gourpada Bhattacharjee, P. W. 3, Panchanan Biswas, P. W. 4 and Brindaban Mondal, P. W. 5. These witnesses corroborate the testimony of Panchu Gopal Biswas with regard to the details connected with the chase and the subsequent arrest of the appellant at the house of Jyotish Haldar. They also furnish corroboration as regards the testimony of Putiram Biswas with regard to the circumstances in which the alarm was given. From the testimony of these persons there can be no doubt that, at the time of his apprehension, the appellant was wearing a blood-stained cloth and also that he had blood-stains on his person. Although he had an opportunity to explain both his attempt to escape and the presence of these blood-stains no satisfactory explanation was offered by him with regard to these matters.

We find that the whole of the deposition of Brindaban Mondal at the previous trial of this appellant was put in under the provisions of S. 145, Evidence Act. This was apparently done for the purpose of bringing some minor discrepancies on the record. The observations which we have already made with regard to S. 145, Evidence Act, apply also in this case as it is quite clear that this witness was not properly cross-examined with regard to these alleged discrepancies nor was he given an opportunity of explaining them. In any view of the matter, however, it was not necessary to put in the whole of this witness's deposition at the previous trial of this appellant. If the proper procedure had been observed, all that need have been done was to put in these passages in the former deposition by which it was intended to contradict the witness. (After dealing with the evidence of the doctor who testified with regard to the nature of the injuries on the deceased woman and of certain other witnesses His Lordship concluded:) We consider that the prosecution case was fully established. The evidence was placed very carefully before the jury by the learned Sessions Judge and, as already pointed out the appellant was in fact given the benefit of certain advantages to which he was not legally entitled. The evidence of Putiram Biswas's was apparently believed by the majority of the jurors and we consider that they were quite justified in considering that this witness had spoken the truth. The circumstances proved by the other witnesses furnish very convincing corroborative details and there is no doubt that the appellant committed a murder of extreme brutality. We consider that the verdict of the jury was correct and that the appellant has been properly convicted of murder. Having regard to the circumstances and the callous and brutal nature of the crime we have no option but to confirm the sentence of death which has been passed upon the appellant. The result, therefore, is that the reference is accepted and the appeal is dismissed.

SEN J. — I entirely agree with my learned brother. The charge of the learned Judge in this case is full and fair, and I see no material defect therein. The main evidence against the appellant is that of an eye-witness Putiram and of certain other witnesses to whom Putiram had described what he had seen. I have not the slightest hesitation in accepting what Putiram had said to be true. That being so, there can be no doubt that the accused committed this murder. Putiram's evidence has been corroborated, as I have said before, by other

persons to whom Putiram described what he had seen and who immediately chased the accused and subsequently seized him. The murder was a most brutal and cold blooded one, and the only sentence that could be passed in a case of this description is the one which the learned Judge has passed.

I agree with what my learned brother has said about S. 145, Evidence Act, and S. 288, Criminal P. C. The only justification for my saying anything more about this matter is that the infringements of these two sections have been far too many in the cases which have come up before me. I shall say only a few words merely to emphasise what has already been said by my learned brother. I shall first deal with S. 145, Evidence Act. When the evidence of a witness given before the jury is sought to be contradicted by something which he has said on some previous occasion in the course of a statement made by him which has been reduced to writing, the proper course to follow is this: the attention of the witness should be pointedly drawn to that portion of the previous statement which is contradictory to his present statement and he should be asked to give such explanation as he thinks proper in respect of the contradiction. It is only after this has been done that that portion of the previous statement which is contradictory to the present testimony can be proved for the purpose of contradiction. Further, the entire previous statement in which the contradiction appears should not be put in evidence but only so much thereof as is contradictory to his testimony before the jury. In this case the deposition of Brindaban Mondal, P. W. 5, at the previous trial of this accused was put in evidence for the purpose of contradicting some statements of Brindaban Mondal made at the present trial. We find that the entire statement of Brindaban Mondal in the previous trial has been put in. Further, we find that the contradictory statements were not expressly put to the witness and he was not given an opportunity of explaining the contradictions. It is not sufficient merely to ask a witness whether he had made a contradictory statement on some previous occasion. He must be given a real opportunity of explaining the contradictions. That is all I need say about S. 145, Evidence Act.

I now turn to the law regarding S. 288, Criminal P. C. This section is constantly being misapplied. The idea seems to prevail that whenever a witness says something which is contradictory to some portion of his former statement, the former statement should be put in under S. 288, Criminal P. C. This is not the intention of the section. Once a statement is put in evidence under S. 288, Criminal P. C., it becomes substantive evidence and it can be used for all purposes subject to the provisions of the Evidence Act. The use of statements put in under S. 288, Criminal P. C., is not restricted to the purposes of contradiction or corroboration. That being so, Judges should be extremely cautious in applying this section. It is only in very exceptional cases that statements should be put in under this section. I do not propose to give any exhaustive list of the conditions under which this section should be utilised; but, for the sake of illustrating my meaning, I would say that where a witness resiles entirely or to a very great extent from his previous statement or where a witness has forgotten a great deal of what he had stated in his previous statement, the Court will be exercising a wise discretion in putting in the previous statement under S. 288, Criminal P. C. But merely because the previous statement contains some stray statements which are contradictory to the present testimony of the witness, it is not permissible to put in the entire previous statement under S. 288, Criminal P. C. In this case, the previous statement of Panchu Gopal Biswas before the Committing Magistrate was put in under S. 288, Criminal P. C. What Panchu Gopal had said before the Committing Magistrate is in all material particulars the same as what he had said before the learned Judge and the jury. There was, therefore, no

justification for putting in the entire statement under S. 288, Criminal P. C.

Further, I would point out that if a statement has been properly put in under S. 288, Criminal P. C., and either of the parties wishes to use any portion of that statement for the purpose of contradicting the present testimony of a witness then it would still be necessary for that party to observe the provisions of S. 145, Evidence Act, by drawing the attention of the witness to the contradictory statement in the previous statement for the purpose of explaining the contradiction.

NASIM ALI AND BLANK JJ.

Sanat Kumar v. Pramatha Nath.

Appeal No. 151 of 1941, D/- 12 & 17-5-1944.

Bengal Money-Lenders Act (10 of 1940), S. 30 (2) — Interest up to 30-9-1936 at rate exceeding 8 per cent.—Subsequent rate not in excess—Interest paid in excess up to 30-9-1936 should be credited towards principal.

[P 326 C 1, 2]

JUDGMENT.—The facts which are not in dispute in this appeal are these: The appellant borrowed Rupees 8,00,000 from the respondent by executing in his favour a mortgage bond on 12th December 1923 with interest at $8\frac{1}{2}$ per cent. per annum with six-monthly rests. The date fixed for repayment of the loan was 12th December 1928. One of the stipulations in the bond was that "after the 12th day of December one thousand nine hundred and twenty-five and until all monies secured by the mortgage bond are called in by the mortgagee the mortgagor will be entitled to make part payments towards the principal sum of Rs. 8,00,000 by instalments of Rs. 10,000 or any multiple of Rs. 5000." From 1st September 1931 the rate of interest was raised to $9\frac{1}{2}$ per cent. per annum with six-monthly rests—the time for repayment was extended to 30th September 1936. From 1st October 1936 the rate of interest was reduced to 7 per cent. per annum with six-monthly rests and the date of repayment was extended to 1st October 1946. The appellant paid interest regularly at the contract rate. A portion of the principal amounting to Rupees 5,60,000 was paid up to 21st May 1932. The interest on the balance was also paid regularly up to 8th June 1940 at the contract rate. The total amount of interest paid from 19th May 1924 to 8th June 1940 is Rs. 5,09,495-2-9. On 11th December 1940 the appellant filed an application under S. 38, Bengal Money-Lenders Act, 1940, for taking accounts and for declaring the amount due to the respondent and payable by the appellant whether as principal or interest or both.

The trial Judge has held: (1) that the appellant is not liable to pay any amount exceeding twice the principal of the original loan i. e., Rs. 16,00,000; (2) that the appellant has already paid Rs. 5,60,000 on account of principal and Rs. 5,09,495-2-9 as interest till June 1940, making a total of Rs. 10,69,495-2-9; (3) that the liability of the appellant cannot, therefore, exceed Rupees 5,30,504-13-3. He has, accordingly, declared that the appellant is liable to pay Rs. 2,40,000 as the outstanding principal and interest on that date at the rate of 7 per cent. from 9th June 1940, till he has paid the claim or a decree for the same has been obtained against him subject to the limit of Rs. 5,30,504-13-3. Hence this appeal by the borrower. Section 38 (2), Bengal Money-Lenders Act, 1940, provides that in taking accounts under that section the Court shall follow the same procedure as it does in regard to civil suits and so far as may be the provisions of Chaps. 4, 6, and 7. Chapter 4 contains Ss. 24 to 27; Chap. 6 contains Ss. 30 to 33 and Chap. 7 contains Ss. 34 to 45. The material portion of S. 30 is in these terms:

"Notwithstanding anything contained in any law for the time being in force, or in any agreement, (1) no borrower shall be liable to pay after the commencement of this Act, (a) any sum in respect of principal and interest which together with any amount already paid or included in any decree in respect of a loan exceeds twice the principal of the original loan, (b) on account of interest outstanding on the date up to

which such liability is computed, a sum greater than the principal outstanding on such date, (c) interest at a rate per annum exceeding in the case of (i) unsecured loans, ten per centum simple, (ii) secured loans, eight per centum simple, whether such loan was advanced or such amount was paid or such decree was passed or such interest accrued before or after the commencement of this Act; (2) no borrower shall after the commencement of this Act, be deemed to have been liable to pay before the date of such commencement in respect of interest paid before such date or included in a decree passed before such date, interest at rates per annum exceeding those specified in sub-cl. (c) of cl. (1):"

Sub-clauses (a) and (b) of cl. (1) of S. 30 do not apply to the facts of this case. The provisions of sub-cl. (c) of cl. (1) of S. 30 are attracted to the facts of this case as the borrower contracted to pay interest at a rate per annum exceeding 8 per cent. simple up to 30th September 1936. He has paid interest at the contractual rate regularly up to that date. Under S. 30 (2) he was not liable to pay interest at rates per annum exceeding 8 per cent. simple. The question, therefore, is whether in taking accounts the amount of interest paid in excess of the statutory rate, i. e., 8 per cent. up to 30th September 1936, ought to be credited towards the outstanding principal on that date or towards interest accruing after that date. The contention of Mr. Gupta on behalf of the respondent lender is this: The meaning of S. 30 (2) is that no borrower is liable after the commencement of the Act to pay before the date of such commencement a sum which exceeds the amount found on calculation at rates mentioned in cl. (c) for the entire period before the commencement of the Act. In order to determine whether there was an excess payment before the commencement of the Act the Court has to find out the sum which has been paid as interest for the whole period from the date of the bond up to the commencement of the Act and to see whether this amount exceeds the amount calculated at 8 per cent. simple for the same period. The amount of interest paid in excess of 8 per cent. up to 30th September 1936, should, therefore, be credited towards interest accruing from after that date up to the commencement of the Act calculated at the rate of 8 per cent. simple.

Section 30 (2) releases the borrower from liability to pay interest at rates in excess of the statutory rate. The borrower paid interest at rates exceeding 8 per cent. up to 30th September 1936. After that date the contractual rate of interest is not in excess of the statutory rate. The interest paid up to 30th September 1936, is therefore hit by S. 30 (2) and not the interest paid after that date. Mr. Gupta in support of his contention relied upon the decision of this Court in 45 C.W.N. 772.¹ The facts of that case, however, were not similar to the facts of the present case. Further the question raised in this case was not directly raised or decided in that case.

In (1901) 1 Ir. R. 78,² it was held that where interest on the mortgage was paid in excess of what is due the over-payments will be treated as payments on account of principal. (See also Fisher on Mortgage, Edn. 7 p. 719.) It is true that in that case interest was paid in excess of the contractual rate but there is no reason why the same principle should not apply where interest is paid in excess of the statutory rate. The attention of McNair J. was not drawn to the principle laid down in (1901) 1 Ir. R. 78² while he decided the case in 46 C. W. N. 873.³ We are, therefore, of opinion that the interest paid in excess of the statutory rate up to 30th September 1936, should be credited towards the outstanding principal. There is, however, a stipulation in the mortgage bond that the mortgagor will be entitled to make part-payments towards the principal by instalments of Rs. 10,000 or any multiple of Rs. 5000. We,

1. ('42) 29 A.I.R. 1942 Cal. 39 : 45 C. W. N. 772, Romesh Chandra v. Jnanada Prosanna.

2. (1901) 1 Ir. R. 78, In re Carroll's Estate.

3. ('43) 30 A.I.R. 1943 Cal. 17 : 46 C.W.N. 873, Pramatha Nath Roy v. Kanakendra Nath.

therefore, hold that in taking accounts the excess amount of interest which was paid by the borrower up to 30th September 1936, should be credited towards the principal outstanding on that date subject to the above stipulation in the bond. Taking account on this basis we declare—(a) that Rs. 2,10,000 is payable to-day as principal but not yet due ; and (b) that Rs. 55,462-14-6 is payable as interest up to 10th June 1944 and is due. The result, therefore, is that the appeal is allowed and the decree of the trial Judge is varied in the manner indicated above. There will be no order for costs in this appeal.

17th May 1944. — The declaration made in this case will not in any way prejudice the right of the appellant to plead S. 27, Bengal Money-Lenders Act of 1940 in any future litigation.

B. K. MUKHERJEE AND SHARPE JJ.

Jagadish Chandra v. Jogendra Nath.

Appeal No. 8 of 1940, D/- 20-3-1944.

Hindu law— Religious endowment—Shebaitship — Two shebaitis managing property in half shares — Lease from each of half share to same lessee with same recitals of necessity within short time of each other— Lease can be held to be on behalf of deity. [P 327 C1,2]

JUDGMENT. — The appellants before us are the shebaitis of certain idols and as plaintiffs they commenced a suit in the Court of the third Subordinate Judge at Dacca for a declaration that the defendants hold the property in suit, not as permanent tenants but as tenants at will under the deities, at a rental of Rs. 4-11-0 per month. There was also a prayer for recovery of rent from the defendants at that rate from Baisakh 1341 to Chaitra 1343 B. S. The material facts which are not in controversy may be shortly stated as follows : The disputed property is a house together with the land underneath and is situated at Kumartooli in the town of Dacca. It admittedly belonged to two brothers Kebal Sen and Kanai Sen. These two brothers established two idols known as Sri Sri Sudarsan Chakra Jew and Sri Sri Gobind Jew, and dedicated jointly, in favour of them, seven house properties including the property in suit. On 9th September 1854, Kebal and Kanai jointly executed a will by which four persons to wit Ram Chandra Sur, Guru Charan Sur, Sonamani Sur and Lakhimani Sur were appointed shebaitis of these deities. After the death of Kebal, Ramchandra and Sonamani, Kanai executed a deed of arpannama on 12th July 1865, by which he re-dedicated to the deities his 8 annas share in the seven houses referred to above and also made gift of his share in certain additional properties to them, directing at the same time that one Madhab Chandra Sur and his heirs would be the shebaitis of the deities in respect to the properties thus dedicated. Lakhimani died after that, and the position then was that Madhab Sur the new shebait exercised the rights of management with regard to 8 annas share of the debuttar property which was dedicated by Kanai, while Gurucharan the other shebait purported to manage the remaining 8 annas share.

On 16th March 1870, Guru Charan by a deed which was described as a kayemi keraya potta leased out in perpetuity an 8 annas share in the disputed house to one Gourmani Dasya at a fixed rental of Rs. 24 a year. On 29th April 1870, Madhab the other shebait executed a similar patta in favour of the same lessee, by which an 8 annas share in the disputed premises as well as two other properties were permanently let out to her at a consolidated rental of Rs. 60 a year. The shebaiti right of Guru Charan gradually devolved upon Bhagirath and Rakhal and they executed an arpannama on 28th August 1900, by which they surrendered their rights as shebaitis in favour of Madhab; Madhab thus became the sole shebait in respect of the entire debuttar estate. On 17th June 1915, Madhab by an arpannama transferred his shebaiti right to his two sons Gobind and Brojendra, and after their death, the present plaintiffs became the shebaitis. In the meantime, the lease-

hold interest of Gourmani in the disputed house was sold in execution of a decree against her on 18th January 1877, and it was purchased by two persons named Lal Mohan Pal and Pajoo Pal. On 21st March 1899, Pajoo Pal sold his interest to Lal Mohan who thus became the sole lessee in respect of the disputed premises. The defendants in the suit are the successors-in-interest of Lal Mohan and they are holding the disputed property at an yearly rental of Rs. 56-4-0 which is made up of Rs. 24 of Guru Charan's lease, and Rs. 32-4-0 as the proportionate share of rent reserved by the lease granted by Madhab. The plaintiffs' case in substance was that there being no legal necessity justifying a permanent alienation of the debuttar estate the leases granted by Guru Charan and Madhab were not binding on the deities, and consequently the defendants could not but have the status of tenants at will under the deities, in respect to the premises in suit.

So far as the plaintiffs' claim for rent was concerned, there was practically no defence by the defendants and the whole controversy centred round the point as to whether the defendants could claim the status of permanent tenants under the two documents mentioned above. Both the Courts below have decided this point in favour of the defendants and the plaintiffs have now come up on second appeal to this Court. Mr. Chakravarty appearing in support of the appeal has not disputed before us that the two pottas granted by the two shebaitis to Gourmani Dasi do purport to create permanent rights in the lessee. It is also conceded that as the documents are very old, and the original parties to the transaction have long passed away the recitals of legal necessity contained in the documents cannot be lightly brushed aside. In fact one of the leases (Ex. D) which was granted by Madhab did come up for consideration before this Court in 42 C. W. N. 837¹ and it was held by Jack and Khundkar JJ. on the strength of these recitals and other circumstances that a valid permanent lease was created by the shebait. Mr. Chakravarty's first and main contention is that as in the case before us, the leases were granted separately by the two shebaitis and each purported to be for a specific share which the grantor claimed in the idols' property, they could not be regarded as acts of the deities or binding on them.

It is pointed out that in the patta granted by Guru Charan (Ex. D1) the lessor expressly states that in case his co-shebait raises any difficulty with respect to the share leased out, the lessee would be at liberty to ask for and obtain a partition of that share. This Mr. Chakravarty argues, conclusively shows that the shebaitis were not acting together or on behalf of the deities. Now, it may be taken to be fairly well established that trustees or shebaitis when they are more than one, form, as it were, but one body in the eye of law. The deity is represented by all of them acting together and no one shebait can be said to possess any specific interest or share in the idols' property : *vide* 27 C. L. J. 605,² 61 I. A. 35³ and 45 C. W. N. 665.⁴ In the case before us, as has been said already, there were originally four shebaitis appointed by the joint will of the founders. After Kebab and two out of the four shebaitis had died, Kanai executed a deed of arpannama on 12th July 1865 by which he made additions to the existing endowment by giving certain additional properties, and also re-dedicated his half share in the houses which he had already dedicated jointly with his brother. By this arpannama Madhab Sur and his heirs were appointed shebaitis in respect of the dedicated properties. The position therefore was that there was a change in the

provision regarding the office of the shebait, and Madhab who was not one of the original appointees was appointed a shebait of the deities with rights of management and control in respect to Kanai's 8 as. share of the properties which were covered by the arpannama of 1865.

It may be assumed that the additional gift made by Kanai, being for the benefit of the idols, the latter accepted the same subject to the condition relating to the exercise of shebaiti rights by Madhab Chandra Sur and his heirs : *vide* 34 C. W. N. 177.⁵ From this time onwards it appears, that Madhab exercised the rights of management with regard to Kanai's share of the debuttar property, while Guru Charan was in charge of the other half. In the eye of law undoubtedly the shebaitship vested in both the shebaitis jointly, and one then could not represent the deity separately from the other. For purposes of management, however, there was a separation and this seems to have been the implication of the provision relating to shebaitship in the arpannama of Kanai. In the patta (Ex. D) Madhab expressly recites that he is in possession of the 8 as. share of Kanai under the deed of dedication, and the passage in the potta of Guru Charan referred to by Mr. Chakravarty which speaks of partition of an 8 as. share points really to the same conclusion. If the idols accepted the additional gift of Kanai on condition that Madhab should not only be a co-shebait, but would have the exclusive right of managing an 8 as. share of the debuttar estate, a lease by Madhab of an 8 as. share in the debuttar property would be quite valid and binding on the deities. If we cannot read the arpannama of Kanai in that way, then also the fact remains that the two shebaitis were exercising their rights of management separately each with regard to a moiety share of the debuttar estate. If in these circumstances the same lessee got two leases from the two shebaitis separately no doubt, but within a short distance of time from each other, and each one of the documents purported to have been executed on behalf of the deity, with the same recitals as to legal necessity, we think that it can be legitimately held that in substance the act was one on behalf of the deities in which both the shebaitis concurred. It may be pointed out here that in 42 C. W. N. 837¹ only the lease granted by Madhab came up for consideration before this Court, and although it related to an 8 annas share of the debuttar estate which Madhab purported to hold as shebait, the lease was pronounced to be valid and binding on the deities by the learned Judges. For all these reasons, we do not think that we should be justified in reversing the decision of the Courts below on this point.

Mr. Chakravarty has contended further that the tenancy which is at present held by the defendants, is not one which was created by the two pottas mentioned aforesaid. It is pointed out that the lease granted by Madhab reserved a consolidated rental of Rs. 60 for the disputed premises as well as two other houses. The rent which is being paid by the defendants in respect of the house in suit is Rs. 56-4 a year or Rs. 4-11 a month. As this is referable only to a new contract of tenancy, the defendants, it is argued, cannot claim the status of permanent tenants on the strength of the two pottas. We do not think that there is much substance in this contention. It appears from the records that the three houses covered by Ex. (D) passed to different hands, and that there was a distribution of the total rent between the three houses, and the proportionate rent assessed for the disputed premises was Rs. 32-4 a year. This sum being added to the rent reserved by the lease of Guru Charan, gave the figure Rs. 56-4 and this is the rent which is being paid all along by the tenants without any change whatsoever. We do not think that mere apportionment of rent amongst the different tenants which were covered by one lease, would by itself affect the permanent character or other

1. ('38) 25 A.I.R. 1938 Cal. 541 : 42 C.W.N. 837, Lakshmi Narayan v. Jagadish.

2. ('18) 5 A.I.R. 1918 Cal. 810 : 27 C. L. J. 605, Norendra v. Atul.

3. ('34) 21 A.I.R. 1934 P.C. 58 : 61 I.A. 35, Baraboni Coal Concern Ltd. v. Gokula Nanda.

4. ('41) 45 C. W. N. 665, Iswar Lakshi Durga v. Surendra.

5. ('30) 17 A.I.R. 1930 Cal. 495 : 34 C. W. N. 177, Ashutosh Seal v. Benod Behary.

incidents of the lease. The result therefore is that the appeal fails and is dismissed. The order for costs made by the trial Court would stand, there would be no order for costs either of this Court or of the Court below.

RAU AND BISWAS JJ.

Debi Prosad v. Satish Chandra.

Appeal No. 191 of 1940, D/- 25-4-1943.

(a) Civil P. C. (1908), S. 47 and O. 21, R. 95 — Decree-holder landlord purchasing property in execution — Suit for possession is barred by S. 47 — He must proceed under O. 21, R. 95 — Claim for mesne profits cannot take matter outside scope of O. 21, R. 95 and overcome bar of S. 47. [P 328 C 1,2]

(b) Limitation Act (1908), Arts. 138 and 139 — Suit barred by statute — Limitation Act cannot create right of suit. [P 328 C 2]

(c) Limitation Act (1908), S. 28 — Applicability — Failure to make application under O. 21, R. 95 does not extinguish title. [P 328 C 2]

BISWAS J. — This appeal arises out of a suit for recovery of possession and for mesne profits. Both the Courts below have dismissed the suit, and hence this appeal by the plaintiff. The facts are not in dispute. The plaintiff is the landlord of an occupancy holding, and the defendants were tenants under him. He recovered a rent decree against them, and in execution of the decree, purchased the holding himself. The sale was held on 22nd June 1932, and confirmed on 26th July following. On 8th February next year, he obtained the sale certificate. It appears that he did not thereafter obtain possession of the holding. Instead, however, of applying to the Court for delivery of possession under O. 21, R. 95, Civil P. C., within three years of the date of confirmation of the sale (as provided in Art. 180 of Sch. 1, Limitation Act), the plaintiff commenced the present suit on 15th September 1938, in which he asked for recovery of possession on declaration of his title and for mesne profits.

Both the Courts below have held that the case comes within the Full Bench ruling in 53 Cal. 781,¹ and in that view, dismissed the suit as barred under S. 47, Civil P. C. It is the propriety of this view which is challenged in this appeal. In the Full Bench case the question was whether an appeal lay from an order passed on an application under O. 21, R. 95 by an auction purchaser who was the decree-holder himself. This was held to depend on whether the case came under S. 47 of the Code, and this in turn was held to depend on: (1) whether the decree-holder auction-purchaser was a party to the suit, and (2) whether the question of delivery of possession was a question relating to the execution, discharge and satisfaction of the decree within the meaning of S. 47. Both questions were answered in the affirmative.

It must follow accordingly that where a decree-holder auction-purchaser seeks to recover possession of any immovable property purchased by him, he must proceed by way of an application, and not by a separate suit; in other words, if he wants khas possession, he is limited to the remedy provided by O. 21, R. 95 of the Code. The learned advocate for the appellant has sought to avoid this effect of the Full Bench decision by an ingenious argument which he rests on the fact that the decree-holder purchaser here was the landlord. He admits that it was open to his client, though a landlord, to proceed under O. 21, R. 95, and he concedes further that a separate suit by his client for the same relief would be barred by S. 47, but his contention is that qua landlord, the plaintiff had an independent right, namely, a right to enter into possession as upon determination of the tenancy, and that it was this right which he was seeking to assert in the present suit. The bar of S. 47, it is said, could not, therefore, apply. In support of his argument, the learned advocate relies on Art. 139 of Sch. I, Limitation Act, I. ('26) 13 A. I. R. 1926 Cal. 798 : 53 Cal. 781 (F.B.), *Kailas Chandra v. Gopal Chandra*.

to show that such a suit is maintainable. Suffice it, however, to say that the Limitation Act does not create a right of suit, but merely recognizes it. If the suit is barred by a specific statutory provision, such as S. 47, Civil P. C. it is no answer to say that the Limitation Act provides for such a suit. Thus, Art. 138 expressly provides for a suit for recovery of possession by a purchaser at a sale in execution of a decree; nevertheless, on the authority of the Full Bench decision, such a suit could not escape the bar of S. 47 of the Code, where the purchaser was the decree-holder. It may be pointed out that in this case apart from S. 47 of the Code, the plaintiff's right of suit is not and cannot be challenged. On the facts it cannot be contended, for instance, that merely because the plaintiff failed to apply for delivery of possession under O. 21, R. 95 within the statutory period of limitation, he lost his title to the property. Section 28, Limitation Act, it will be observed, applies only to suits and not to applications, so that it is only on the expiry of the period of limitation for instituting a suit for possession of any property, and not for making an application for possession, that the right to the property is extinguished. The only question, therefore, that arises is whether the suit is hit by S. 47.

We find it difficult to hold that the mere fact that the auction-purchaser is landlord decree-holder will make any difference in the applicability of the Full Bench ruling to this case. A landlord decree-holder is a decree-holder all the same, and he will accordingly come within the terms of the decision. As landlord, the plaintiff might have the right of re-entry on determination of the tenancy, but there is no getting away from the fact that the determination of the tenancy here was the direct result of his auction-purchase as decree-holder, causing a merger of the interests of landlord and tenant in the same person. It is the auction-purchase, therefore, which constituted his cause of action, and one does not see how a suit by him to recover possession could be referred to his character as landlord, and not as decree-holder auction-purchaser. A further argument was raised on behalf of the appellant on the ground that the plaintiff here had asked for mesne profits besides praying for possession. It was said that as a claim for mesne profits was not within the scope of an application under O. 21, R. 95, the suit could not be held to be barred by S. 47: S. 47 could only bar a suit when the same relief could be obtained by application. The short answer is that a claim to mesne profits can arise only when the plaintiff has established his title to recover possession. The effect of the Full Bench decision is that so far as possession is concerned, his only remedy is by way of application under O. 21, R. 95 and then if he seeks mesne profits, he must bring a separate suit for the purpose. This doubtless may seem to involve a needless multiplicity of proceedings, but whether this is a consideration which might or should have weighed with the Full Bench, it is not for us to say. It does not appear that this aspect of the matter was at all presented to, or considered by, the Full Bench but the decision is there, and so long as it stands, we are bound by it. The result is that the view taken by the Courts below must be affirmed, and the appeal dismissed with costs.

RAU J. — I agree.

ROXBURGH AND BLANK JJ.

Arjun Lal v. Banbehari.

Appeals Nos. 132 and 192 of 1940, D/- 5-7-1943.

(a) Civil P. C. (1908), S. 11, O. 40, R. 1 and S. 47 — Application for permission to execute decree against estate in hands of receiver—Objection that decree was not binding on estate overruled—Decision held did not operate as res judicata. [P 330 C 1]

(b) Civil P. C. (1908), O. 31, R. 2 and S. 47 — Money suit — All trustees not made parties but trust estate itself made party—Trust estate held was substantially re-

presented — Objection that decree did not affect estate held could not be raised in execution proceedings.

[P 330 C 1]

(c) Civil P.C. (1908), O. 21, R. 16 as amended by Calcutta High Court—Object of—Judgment-debtor appearing and objecting to execution—Failure to serve notice under O. 21, R. 16—Effect of.

[P 330 C 1]

(d) Civil P. C. (1908), O. 40, R. 1 — Court appointing Receiver in one suit—Execution of decree against Receiver passed by same Court in another suit — Power of Court to control execution proceedings. [P 330 C 2]

(e) Contract — Joint debtors — Release of some of judgment-debtors does not amount to release of others.

[P 330 C 2]

ROXBURGH J. — These appeals arise out of one judgment of the Subordinate Judge of Asansol in a proceeding under S. 47, Civil P. C., instituted on an application by the Receiver of a certain trust property known as the Mukunda Madhusudan Trust Estate. Execution of a decree in Money Suit No. 288 of 1932 of the Dhanbad Court was proceeding in the Court of the Subordinate Judge of Asansol, the trust estate being defendant 15 in that suit. Arjun Agarwalla, assignee of the decree in Money Suit No. 288 is the appellant in F. M. A. No. 132 while the Receiver Bonbehari Chatterjee, is the appellant in F. M. A. No. 192. The trial Court has held: (1) that the objector's contention that the decree in Money Suit No. 288 of 1932 is not valid against the trust estate cannot be raised in execution proceedings; (2) that notice under O. 21, R. 16 was duly served on the trust estate; (3) that the fact that the decree-holder had accepted certain sums from some of the judgment-debtors, viz., Rs. 1500 from original defendants 9-11, Rs. 1500 from defendants 31-35, and Rs. 1100 from defendant 13 in full satisfaction of their claims was no bar to his realizing the whole balance from the Receiver; (4) he has however directed as a Court of equity and as the Court appointing the Receiver in T. S. No. 22 of 1937, that the Receiver is only to be allowed to pay first the actual share of the estate, namely 10½ pies and has directed that the decree-holder will then after realization of this amount, proceed against the other judgment-debtors and on his failure to obtain the decretal amount from them, he will be allowed to proceed with the execution of the decree against the properties in the hands of the Receiver, after taking fresh permission of the Court. The Receiver appeals in respect of the first three decisions; the decree-holder appeals in respect of the limitations contained in the fourth decision.

Money Suit No. 288 of 1932 was brought in respect of certain mining royalties. Defendant 7 in the suit was Sm. Indumati Debi; defendant 8 was Sm. Gopibala Debi, both described as daughters of Mukunda Lal Laik, who was in fact the settlor of the trust Mukunda Madhusudan Sampat, which is so named in the deed of trust. Defendant 15 was the 'Mukunda Madhusudan Sampat Trust Estate.'

The final decree is Ex. A (A/part II/4). As appears from the judgment in the suit 'after restoration' (Ex. 3B. Part II/1) dated 29th June 1933, the suit was originally decreed on 16th August 1934 on contest against defendant 14 and ex parte against defendants 4-36. There were three applications for restoration under O. 9, R. 13, Civil P. C., one of which was made on behalf of defendant 15 (Mukunda Madhusudan Trust Estate). It appears further that originally the suit was only against defendants 12 to 14 heirs of one of the four original lessees, and that the remaining defendants, including defendant 15, the trust estate, were subsequently brought on the record. After restoration a joint decree on contest against defendant 15 and against others was passed on 29th June 1935 and this was made joint with the previous decree against the other defendants. The decree recites that the suit was disposed of in the presence of Mr. Sasanka Mukherjee, pleader for defendant 15.

* Note. — We have marked the paper book in F. M. A. No. 132 as 'A' and that in F. M. A. 192 as 'B'.

defendant 15. The Vakalatnama filed in the suit on behalf of the estate, dated 21st January 1934, bears the seal of the Mukunda Madhusudan Sampat Estate, with Srimati Indumati Debi shown as 'Kartri Paricharika' and is signed by her as such. This was filed before the original ex parte decree was passed on 16th August 1934, and the judgment after restoration shows that defendant 15 filed a written statement at the original stage. There was an issue in the suit after restoration "Has the plaintiff any cause of action for this suit against defendants 15, 21 (a) and 30" and there is a finding that the plaintiff "as assignee has got every right to claim the arrear of rent purchased by her from all the principal defendants who are the heirs and legal representatives of the original lessees," and that nothing had been shown why "the plaintiff should not get a decree against the present defendants."

We proceed to consider the matter arising out of the first point decided by the trial Court. On behalf of the Receiver, Mr. Amarendra Nath Bose contends that despite all that was done in Money Suit No. 288, the suit is defective to affect the trust property because the provisions of O. 31, R. 2, Civil P. C., were not complied with, as all the trustees were not made parties. At a preliminary hearing of this appeal the trust deed was not available; it has been called for and is now before us, it shows that the original settlor, Mukunda Lal Laik, was to be the first trustee, and after his death his wife, and after her death his daughters, Indumati Devi and Gopibala Devi (defendants 7 and 8 in the suit). There is provision that when there was more than one trustee the elder was to be karta and was to manage the estate, taking the opinion of the others. Mukunda Lal Laik and his wife are now dead, and according to the terms of the deed, Indumati and Gopibala are now the trustees, the former being senior and 'karta.' Mr. Bose contends that Gopibala is a trustee, and she has not been made a party as such. The appearance of the estate on the record by name, represented by a pleader appointed by Indumati as 'kartri paricharika' is not sufficient. The Receiver was appointed in T.S.No.22 of 1937 of the Court of the Subordinate Judge of Asansol. This was an administration suit filed on 9th May 1938, by Gopibala Devi on behalf of herself and other beneficiaries of the trust estate, and also as trustee against her sister Indumati Devi as head trustee and beneficiary of the estate, and others. According to the judgment (Ex. 1-B, part II/18) in this case the affairs of the estate had drifted from bad to worse until Indumati "wisely applied to the Sub-Judge of Purulia early in 1932 and obtained an order (Ex. 49) consistent with her seniority and the terms of the trust deed in pursuance of which she alone took up the estate management on 28th April 1932, as its 'kartri paricharika.' The learned Judge stated: "I think defendant 1 should cease to be the sole kartri paricharika and be considered in terms of the trust deed as joint trustee with her younger sister Gopibala He directed that accounts be taken to ascertain the liability of Indumati as kartri paricharika during the period from 28th April 1932 (the date of the appointment by the Subordinate Judge of Purulia) and 19th May 1937, the date of the filing of the plaint in the suit before him, and directed that "plaintiff 1 and defendant 1 are joint trustees of this trust property and the right of defendant 1 as sole kartri paricharika ceases from this date." The sons of the sisters were appointed as Receivers, but subsequently the present Receiver has been appointed in their place. The order of the Subordinate Judge of Purulia, dated 27th April 1932, referred to in the judgment in T. S. No. 22 of 1937, was also called for in this appeal along with the trust deed. The order does not show more than that the Receiver in the suit before the Subordinate Judge of Purulia was authorised to pay all amounts to the kartri paricharika. It remains to note that in the course of the execution proceedings in respect of M. S. No. 288, the assignee of the decree, (Arjun Agarwalla) applied in T. S. No. 22 of 1937 for permission to execute the decree against defendant 15.

(the Trust Estate). The Receiver objected, but by an order dated 10th August 1939 (Ex. B, A Part II/62) his objection that the estate had not been properly represented in the money suit was overruled, and permission to execute was given. We do not, however, think that this decision precludes a different decision in the present case; in an application for permission to proceed against the Receiver the point was obviously not a proper one on which permission could have been refused. We have set out the facts at length, though the point was decided briefly by the learned Subordinate Judge on the ground that no objection as to the validity of the decree can be raised in the execution proceedings. The more detailed examination of the facts does not lead us to any different conclusion. At best the point is a highly technical one, though that alone is no reason why it should not succeed. The estate has in substance been represented throughout; the suit was brought during the period after 28th April 1932, when the kartri paricharika had an official recognition from the Purulia Court, the exact nature of which is not very clear. Until the present Receiver arrived on the scene no one ever thought of suggesting that there had not been proper representation of the Trust Estate. In the suit Indumati herself appeared as 'kartri paricharika' instructing the pleader for the Mukunda Lal Madhusudan Sampat; both sisters were parties in their own names. No objection to the representation was taken, on the other hand the decree was reopened at the instance of the estate so represented. In view of these circumstances we see no reason to differ from the view of the trial Court that no objection can be taken in execution to the validity of the decree to affect the Trust Estate. The appeal fails in respect of the first point raised.

The second point decided by the trial Court raises the question whether notice under O. 21, R. 16 was properly served, and, if not, whether the failure to make service is fatal to the execution. Mr. Bose relies on the decision in 54 Cal. 624¹ and in 42 C.W.N. 949.² Order 21, R. 16 was amended so far as this Court is concerned in 1933, and it is clear that now no contention can be made as to the validity of proceedings pending the hearing of the objections of the judgment-debtors, if any, whatever might be the case under the rule as it stood before amendment. The earlier case cited was decided under the rule as it so stood. In the present case it may be stated without discussion that the trial Court is in error in holding that as the notice was duly stuck up the service on the estate was good. Service had been first attempted in M. Ex. Case No. 474 of 1935 on a person not authorised to receive summons. There was thus no service of notice, but on the other hand, the Trust Estate through Indumati Devi, as kartri paricharika filed an objection on 14th May 1937, in the later execution case No. 96 of 1937, ground (d) of which specifically challenged the assignee's right to proceed. (Ex. I. A. part II/47). The objection was dismissed for default and non-prosecution on 21st July 1937, (Ex. D (5) A Part II/55). Shortly after this, on 8th August 1937, the Trust Estate appeared in the same manner and applied for an adjournment of the sale waiving fresh issue of sale proclamation. The object of O. 21, R. 16 is to give the judgment-debtors an opportunity to object to execution by the assignee. In this case, the objector defendant 15, the Trust Estate, had the opportunity and took it, though it did not press the matter. Unless it can be said that O. 21, R. 16, enacts a formalistic but essential ritual, so that even though the judgment-debtor appears and objects to execution by the assignee still, unless he has been served properly with the piece of paper informing him of his opportunity to object, the proceedings must fail as nullities, there is no substance in the point now raised.

1. ('27) 14 A. I. R. 1927 Cal. 781 : 54 Cal. 624, *Umamoyee Dasya v. Jatan Bewa*.
2. ('38) 25 A.I.R. 1938 Cal. 734 : 42 C.W.N. 949, *Mt. Sarifa Katoon v. Assimannessa Bibi*.

We do not think this is the correct view, particularly having regard to the amended form of R. 16; the objection on the ground of non-service of notice under O. 21, R. 16 fails.

The third and fourth points decided by the trial Court may be disposed of together and cover both the appeals. We think that the learned Subordinate Judge was in error in obtruding his functions as Court appointing the Receiver (in T. S. 22 of 1937) into the matter of the execution of the decree in M. S. 288 of 1932, and further that his order even regarded as, strictly speaking, one made in T. S. 22 of 1937, is not proper. As Court appointing the Receiver we do not think he should have attempted to control the proceedings in the execution as he has done. In any case it is clear that the fact that the decree-holder may have released some of the joint judgment-debtors from some part of their share of the judgment debt does not affect the liability of the others to contribute: 46 C.W.N. 234,³ and under S. 44, Contract Act, it does not discharge the other joint debtors. The decree-holder is entitled to proceed against the remaining judgment-debtors in such manner as he chooses; the executing Court could not prevent him so doing, and we do not think that the fact that one of the judgment-debtors is a Receiver gives, in the circumstances, the Court which appointed him any right to place obstructions in the way of execution. Even conceding that in special circumstances some control might be properly exercised by the Court appointing the Receiver, we see no reason for such interference in this case. The result is that we allow the appeal of the decree-holder in this matter, and dismiss that of the Receiver. In the result appeal No. 132 of the decree-holder succeeds and is allowed with costs. The appeal of the Receiver No. 192 fails on all points and is dismissed with costs. The order of the trial Court is modified and the application of the Receiver is dismissed in toto with costs. Hearing fee two gold mohurs in each case. Let the records be sent down as early as possible.

BLANK J.—I agree.

3. ('41) 46 C.W.N. 234, *Gour Mohan v. Kanta Mohan*.

KHUNDKAR AND SEN JJ.

Md. Sulaiman v. Emperor.

Cri. Appeal No. 403 of 1942, D/- 22.4.1943.

(a) Defence of India Rules (1939), R. 81 (2) — Non-ferrous Metals Control Order 1941 as amended in 1942 — Advance sales of controlled metal — Obtaining of permit before delivery would protect vendor (Per *Khundkar J.*) [P 331 C 2]

(b) Defence of India Rules (1939), R. 81 (2) — Non-ferrous Metals Control Order 1941 as amended in 1942 — Sale and delivery of controlled metal without permit — That purchaser had licence or controller had notice is no defence. [P 332 C 2]

(c) Defence of India Rules (1939), R. 81 (2) and (4) — Non-ferrous Metals Control Order 1941 as amended in 1942 — Deliberate violation of order by sale and delivery of tin and lead without permit — Sentence ought to be deterrent — Sentence of imprisonment and not fine held adequate [P 333 C 1; P 334 C 1]

KHUNDKAR J.—The appellant has been convicted of a charge containing three counts under R. 6, Non-Ferrous Metals Control Order, 1941, as amended by a Central Government Notification, dated 8th January 1942, read with R. 81, sub-r. (4), Defence of India Rules, 1939. The appellant pleaded guilty, and was sentenced to suffer rigorous imprisonment for a period of three months, and to pay a fine of one thousand rupees. The present appeal is directed against the sentence. Mr. Suhrawardy who appears for the appellant has urged us to set aside the sentence of imprisonment, but this prayer has been opposed by the learned Advocate-General, who appearing on behalf of the Crown, has contended that the offences committed by the appellant were so serious that a fine would not be a sufficient

punishment, and that a sentence of imprisonment is called for. The material portions of R. 81, Defence of India Rules, should be set out. Sub-rule 2 (a) is in the following terms :

"The Central Government (or the Provincial Government), so far as appears to it to be necessary or expedient for securing the defence of British India or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community may by order provide : (a) for regulating or prohibiting the production, treatment, keeping, storage, movement, transport, distribution, disposal, acquisition, use or consumption of articles or things of any description whatsoever and in particular for prohibiting the withholding from sale, either generally or to specified persons or classes of persons, of articles or things kept for sale, and for requiring articles or things kept for sale to be sold either generally or to specified persons or classes of persons or in specified circumstances;" Sub-rule (4) is as follows : "If any person contravenes (any order made under this rule), he shall be punishable with imprisonment for a term which may extend to three years (or with fine or with both)." On 12th July 1941, there was published in the Gazette of India, Notification No. 288 embodying the Non-Ferrous Metal Control Order, 1941. Clause 3 of this order provides that no person shall be a stockholder or dealer except under and in accordance with the conditions of a license in a prescribed form granted by the Controller. Clause 6 provides that no stockholder or dealer shall sell the metals to which the order applies unless he has obtained from the Controller a permit in a prescribed form. On 10th January 1942, there was published in the Gazette of India a Notification by the Central Government which had the effect of adding tin and lead to the list of metals to which Non-Ferrous Metal Control Order, 1941, applied. It is not disputed that the appellant was aware of both the Notifications just referred to. In his business premises was found a cutting from a newspaper, Ex. 29/1, dated 12th January 1942, which reproduced a Notice from the Department of Supply informing the public that the Non-Ferrous Metal Control Order would henceforward include lead and tin. This Notice left the position in no manner of doubt, for it stated as follows :

"All persons interested in these metals are informed that: (1) Persons who now have in their possession or under their control two or more tons of tin or lead and persons who have in their possession or under their control quantities of tin or lead which in the aggregate in any one calendar month are not less than two tons, are stockholders" and as such require licenses (4) Licenses and certificates are obtainable from the Controller of Non-Ferrous Metals, who is the Director-General, Munitions Productions, Department of Supply, 6 Esplanade East, Calcutta. (5) Sales of tin or lead can be made only under permit from the Controller. (6) Stockholders and dealers are required to send the Controller within 14 days, and thereafter by the seventh day of each calendar month, a return of all quantities of tin or lead in their possession or under their control." India received her supplies of tin and lead very largely, if not indeed entirely, from Malaya and Burma. Early in January 1942, supplies from Malaya had ceased, and those from Burma were becoming jeopardised. These metals were in urgent demand for the manufacture of munitions, and Government found it imperative to control all stocks and sales in this country. It accordingly took measures to ensure that all stocks would be disclosed by the holders thereof, and that dealers would not dispose of their stocks without the knowledge and consent of Government. How essential these measures were, and how rigorous was the necessity for their meticulous observance can readily be imagined. The appellant had stocks of these metals, and he dealt in them by way of purchase and sale. It was therefore incumbent on him to obtain forthwith a stockholder's license and never to sell without a permit, a permit being required for each sale. It has now to be seen what regard he paid in his dealings to the order above noted. It may here be stated that it would appear to have been a

custom of this firm to enter a transaction in their book as a sale on one day but to make delivery of the goods sold on a day much later. It therefore often happened that there was an appreciable interval of time between the sale and the delivery. Although the Government order required stockholders and dealers to obtain a permit before selling, it is reasonably clear that what were really sought to be controlled were deliveries, and I am of the opinion that the appellant would have been protected had he obtained a permit even in the interval before delivery, but after sale, in those cases which are described by him as advance sales. But evidence has been given to show that the appellant frequently sold a controlled article without applying for a permit, and that in some instances when he applied for a permit after he had done so, he proceeded to deliver the goods without receiving the permit. Although the appellant knew of the Control Order on 12th January 1942, he did not apply for a stockholder's license until 23rd January. This was issued on 27th January. Even before applying for a stockholder's license he sold fifteen slabs of tin to Ghulam Ali Abdul Hossein, eight slabs on the 14th and seven slabs on 15th January. These were shown in the books of the appellant's firm as advance sales. The eight slabs sold on the 14th were delivered to the purchaser on that day. The seven slabs sold on the 15th were delivered on 21st January. This delivery was the subject-matter of the first count in the charge. The appellant did not even apply for a permit to cover this transaction, and he did not take any steps to inform the Controller that such a transaction had taken place. On 20th January, there was entered in the books of the appellant's firm an advance sale of a quantity of tin to the Kamani Metal Refinery and Metal Industries. On 23rd January, the appellant submitted, as required by the Control Order, a return of his stocks. This purported to show his stocks as they stood on 21st January. Item 2 of this return reads as follows :

Description of stock	Quantity.	Date on which and price at which acquired	Remarks.
Tin-Burma	T. Cwt. qrs. lb. 9—1—2—12.	6-1-42. @ Rs. 150 per md.	Advance sold 1 T. 7 cwt. 1 qr. 8 lb. @ Rs. 200 per md.

It has been argued on behalf of the appellant that the note in the remarks column relates to the advance sale of 20th January, and was a sufficient intimation to the Controller of the fact that an advance sale had taken place in respect of nineteen slabs. The argument is without substance. The number of slabs is not mentioned, and the identity of the purchaser is not disclosed. No permit was obtained or even applied for in respect of this transaction. It is sale and delivery without permit which constitutes the offence, and it is no answer to say that the Controller had notice that an offence was about to be committed. On 11th February the appellant's firm delivered ten slabs of tin to the Kamani Metal Refinery. This was the subject-matter of the second count. The appellant attempts to justify it as a part of the transaction indicated in the above-mentioned entry in his return of stock submitted on 23rd January. As already stated, that was no justification and the sale and delivery were not covered by any permit. It was however argued on the appellant's behalf that he was persuaded to deliver these ten slabs to the Kamani concern by the Chief Controller of Purchase (Munitions), who on 11th February wrote a letter (Ex. 19) to the appellant's firm which is in these terms:

"Kindly arrange immediately to deliver 25 Ingots of tin to Messrs. Kamani Metal Refinery and Metal Industries, Calcutta. The necessary sanction for releasing the store has already been obtained by this office from Deputy Director of Metal (Non-ferrous) Calcutta to whom an application may be made by you for obtaining the necessary permit to sell the above store. In this connection, it is pointed out that, as

the material is urgently required for Government use delivery is considered essential prior to receipt of any confirmation or formal permit from the D. D. M. (N. F.) Calcutta. Kindly confirm urgently that you are taking action accordingly."

On behalf of the appellant it is contended that as the Chief Controller of Munitions Purchase was pressing for a delivery of tin to the Kamani concern, the appellant was performing a public duty in complying with this urgent request. The argument would have been sound but for one fact. The Chief Controller of Munitions Purchase was asking for delivery not of ten but of 25 slabs of tin which the appellant's firm actually delivered to the Kamani concern a few days later, on 16th February. This sale and delivery of 25 slabs is an entirely different transaction. The appellant applied on 6th February for a permit to supply 25 pieces of tin to the Kamani Metal Refinery and Industries (Ex. 8). On 11th February the Controller of Non-Ferrous Metals wrote a letter to the appellant's firm refusing the request for a permit (Ex. 9). On the same date the Controller of Munitions Purchase wrote the letter (Ex. 19) above quoted pressing for delivery of 25 slabs to the Kamani Refinery. The appellant's firm delivered this quantity to the Kamani Concern on 16th February. No charge has been preferred in regard to this sale or delivery, obviously because of the letter, Ex. 19. But if Ex. 19 is to be regarded as justifying a delivery of 25 slabs on 16th February, it can have no relation to the delivery of ten slabs on 11th February which was therefore entirely unauthorised.

The third count of the charge relates to sale and delivery of 18 slabs of tin to Bhagwandas Bendiprosad on or about 11th February. By a letter, Ex. 10, dated 9th February, the appellant had asked for a permit to supply 23 pieces of tin weighing 42 cwts. to Bhagwandas Bendiprosad. It is said that this application included 18 slabs covered by contracts of sale entered into on 2nd, 3rd and 4th February. If this is so, then these contracts also represented advance sales made before any permit in respect of them was applied for. The application for a permit was refused by the Controller in a letter dated 17th February — Ex. 11. But the appellant's firm had meanwhile already delivered 18 slabs of tin to the purchaser on 11th or 12th February. Now, I would refer to another transaction with respect to which there was no charge. On 11th February the appellant wrote another letter, Ex. 21, asking for a permit to supply a further quantity of tin weighing about 11 cwts. to the same party, Bhagwandas Bendiprosad. On the very next day, 12th February, he delivered 11 slabs of the metal to this purchaser. No permit was ever issued for this delivery. On 12th February, the appellant wrote a letter, Ex. 12, to the Controller which is in these terms: "Please note that to-day we have delivered to Bhagwandas Bendiprosad the undermentioned Burma tin as per their License No. 594/595: 20 pcs. K. C. M., weight 55 cwt. 3 qrs. 20 lbs." Here "29 pcs." stands for 29 pieces, being the 18 mentioned in the third count of the charge, and the 11 delivered on 12th February in respect of which delivery, no charge was framed. On 16th February, the Controller wrote a letter, Ex. 13, to the appellant's firm demanding to know on what authority they had delivered the tin mentioned in Ex. 12, the letter quoted above to Bhagwasdas Bendiprosad. No reply was vouchsafed to this enquiry. But there can be little doubt that the appellant was aware of the fact that an explanation was called for, and a justification needed. He accordingly armed himself with a letter, Ex. B, which a concern called "The Eyre Smelting Co., Ltd." addressed to his firm on 26th February. The contents of this letter are as follows:

"Dear Sirs,

Please note that we have taken delivery of 55 cwts. 2.20 tin Ingot which is required for orders received from the Department of Supply and concerns of national importance. Our License Number is 594 dated 6th November 1941, and

the Department of Supply have authorised us to purchase Tin Ingot. No responsibility therefore is attached to you.

Yours faithfully,

For the Eyre Smelting Co. Ltd.,

Sd/- Stanley Brown, Manager, Indian Branch."

It is now contended on behalf of the appellant that Bhagwandas Bendiprosad was the person who was purchasing on behalf the Eyre Smelting Co., Ltd. It is urged in this connexion that the License No. 594, mentioned in Ex. B, is really the same as the License No. 594/595, attributed to Bhagwandas Bendiprosad in Ex. 12, the appellant's letter of 12th February, in which he stated that he had supplied twenty-nine pieces to that person. On 13th March, the Controller addressed an express letter, Ex. 14, to the appellant's firm inviting reference to his previous letter of 16th February in which he had called for an explanation of the delivery to Bhagwandas Bendiprosad. The appellant then replied on 31st March by a letter, Ex. A which is as follows:

"Dear Sir,

Re. Supply Dept. No. ENF/4283/GRI dated 13th March, 1942.

Further to our letter of 12th February 1942, we find that a mistake has occurred in the correct name of the purchaser. The real purchasers were Messrs. The Eyre Smelting Co. Ltd., holder of License No. 594 dated 6th November 1941, which number was also mentioned in our above quoted letter. Messrs. Bhagwandas Bondiprosad acted on behalf of the License-holders.

We also send you herewith a copy of the letter of Messrs. The Eyre Smelting Co. Ltd., dated 26th February 1942.

Please note and oblige.

Yours faithfully."

It has been strenuously contended by learned counsel for the appellant that this letter Ex. A contains a satisfactory explanation, and that the letter Ex. B discloses a sufficient justification for selling and delivering the tin mentioned therein to Bhagawndas Bendiprosad. The argument is that the appellant satisfied himself that the party to whom the tin was going was a proper party because the operations of that party were covered by a license. This, in my judgment, in no way mitigates the offence of violating the stringent order which requires a permit to be obtained for every sale and delivery. Enough has been stated to show that on several occasions the appellant deliberately violated the Control Order by selling and delivering quantities of tin without a permit. It has been argued in extenuation that all the sales and deliveries were to persons who had licenses either to stock or to manufacture, and that the goods were not passing into wrong hands. This, as just stated, is beside the point. The infringement of an absolute prohibition cannot be at all justified on the ground that the transgressor thought that no harm would be done thereby.

It has been next contended that the appellant was being urged to make deliveries to concerns engaged in the manufacture of munitions, and attention is called to the letter of 11th February 1942 from the Chief Controller of Munitions Purchase (Ex. 19) pressing for the delivery of twenty-five slabs of tin to the Kamani Metal Refinery. In the circumstances, this delivery which was made on 18th February though not covered by a permit was excusable, and as already stated no charge has been founded upon it. But the other delivery of ten slabs to the Kamani Concern on 11th February, which was the subject-matter of count 2 of the charge was without such justification. The sale of this consignment shown as an advance sale, was effected as early as 20th January, and was not the consignment to which the letter of the Controller of Munitions Purchase had reference. It was not covered by a permit, and indeed no permit to sell or deliver this lot of ten slabs was ever applied for.

In support of this appeal Mr. Suhrawardy has strenuously contended that the offence, which the appellant did not ever deny, was devoid of any element of moral turpitude. The appellant was not a profiteer, nor was

he a dealer in what is known as the black market. His action in selling and delivering quantities of tin without permits was misguided, and at the most he was guilty of carelessness. He never concealed the state of his stocks because he regularly submitted the returns which the rules called for. He felt he was not contravening the spirit of the Control Order because the persons he was supplying the metal to were not unauthorised to deal in this metal. He has further contended that the appellant is deserving of mercy because he has lost a large fortune which he had invested in Burma, and because here in Calcutta he was devoting a great deal of money and time to the care of refugees from Burma, and that at the same time he was managing the affairs of his firm single handed. I have given all these considerations my anxious attention, but I feel that in the present case moral turpitude is not the criterion of punishment. Tin and lead are not now just ordinary commodities of domestic or industrial use. Inasmuch as they are needed in the manufacture of munitions, they have become materials required by the State for the defence of the community in a time of national emergency. The available stocks of these commodities are extremely limited. It was clearly imperative that these stocks should be conserved. The strictest control over all dealings in these metals was called for. Any system of control had of necessity to be stringent, and the measures taken had to be strictly enforced. It follows that punishment for any violation of prohibitions which such measures involved should be deterrent. It is true that sub-r. (4) of R. 81 prescribes the alternative penalty of fine for the contravention of any orders made under the rule. But it is the duty of the Court to determine which punishment is called for by the circumstances of the case, and the Court would be failing in its duty if it lost sight of the inclination of dealers to make profit out of irresponsible commerce in commodities which are needed by the nation and sought to be controlled by Government.

I think a sentence of imprisonment is necessary in the present case, but in deference to all the considerations urged in mitigation, I also think that the imprisonment to which the appellant has been sentenced should be simple imprisonment. Regard being had to the appellant's social position, I am of the opinion that imprisonment, even though it is simple, will be a sufficient punishment in his case. We direct that the sentence passed by the Magistrate be altered to one of simple imprisonment for three months. Subject to this modification the appeal will stand dismissed. The accused appellant must surrender forthwith to serve out the sentence.

SEN J. — This is an appeal on the ground of sentence, the appellant having pleaded guilty to three charges of having sold tin without a permit in contravention of the provisions of R. 6 of the Non-Ferrous Metal Control Order of 1941. The appellant has been sentenced to three months rigorous imprisonment and to pay a fine of one thousand rupees, in default, to a further term of rigorous imprisonment for one month. This was the sentence passed on the first charge, no sentence has been passed on the other charges. Mr. Suhrawardy characterises this as a "savage" sentence and places certain circumstances before us which he says should induce us to reduce the sentence to one of a nominal fine. The learned Advocate-General on the other hand, contends that the violation of the order has been defiant and deliberate, if not worse. We have spent a very great deal of time on this matter more time, perhaps than it merited. I am of opinion that this is not a case where a nominal sentence would be sufficient. It is true that the prosecution has not shown—and indeed it has not attempted to show—that these sales without permit were to parties who had no license to deal in this metal, nor has the prosecution shown or attempted to show that the accused has sold the metal at an excessively high price, but the Crown has been able to prove quite satisfactorily that the appel-

lant has deliberately disobeyed the order not only in the 3 instances which formed the subject-matter of the charges but also in some other instances.

The order was promulgated in July 1941 and on 10th January 1942 tin was added to the list of non-ferrous metal affected by the order. A newspaper cutting of the order dated 12th January 1942, was found in the office of the appellant. The appellant was obviously aware of the order on that date yet on 13th, 14th and 16th January he sold and delivered tin to Ghulamali Abdul Hussain without a permit. Mr. Suhrawardy argues that the appellant could not quite appreciate what the order meant at that time. I cannot believe this. It is stated in the order that it is to take immediate effect. Next the order says that no tin is to be sold without a permit from the Controller. Nothing could be simpler to understand. Mr. Suhrawardy points to R. 8 of the order which is Ex. 3. It says that every stock-holder of tin is to submit a return of the nature described therein within 14 days from the commencement of order and thereafter on the 7th day of every month. He says that his client was misled by this rule into thinking that the order would not come into force till 14 days after 10th January, i.e., till after 23rd or 24th of January. I am not able to accept this excuse. According to the accused's own statement his firm was doing very extensive business for a large number of years in Burma and India. He was not an ignorant petty trader but a merchant of standing and experience. I cannot believe that he did not understand the simple directions given in the order. The violation was deliberate.

As regards the 2nd charge, it relates to the delivery of 10 slabs of tin to Kamani Brothers on 11th February 1942. In respect of this delivery the explanation is that on that day he got a letter from the Chief Controller of Purchases to deliver tin to Kamani Brothers in anticipation of a permit being granted and that as a result of this letter he delivered the tin. This explanation is not convincing. The letter from the Chief Controller did not relate to these 10 slabs at all, it related to a sale of 25 slabs for which permission was asked on 6th February 1942. These 25 slabs were actually delivered on 16th February 1942. For the ten slabs no permission had been asked for or granted. Another explanation given is this. The sale of these 10 slabs was shown as an advance sale in the return of 23rd January 1942 and no objection was taken by the authorities, accordingly the accused thought he was free to deliver the 10 slabs. The showing of an advance sale in the return cannot absolve a stock holder from getting a permit to deliver. This must have been clear to any merchant who had read the order as this merchant undoubtedly had. It is thus clear that this violation was also deliberate.

The last charge relates to the sale of 29 slabs to Bhagwandas Bendiprosad. Permission was asked for on 9th February and 11th February. Without waiting for permission to be granted delivery was given on 11th February. The explanation is founded on the letter of 11th February from the Chief Controller. It is said that this letter created an impression on the mind of the accused that delivery of tin was to be made at once to all purchasers in anticipation of permission. This is an absurd explanation. The letter in terms referred to a particular contract only, viz., the contract to sell 25 ingots or slabs to Kamani Brothers. No sensible person would construe the letter to mean that it embraced all contracts. Next it was pointed out on behalf of the appellant that Bhagwandas Bendiprosad were merely the brokers of Messrs. Eyre Smelting Co. Ltd. who gave a letter to the accused stating that the metal was required for concerns of national importance and absolving them from liability. This letter was taken on 26th February long after delivery was given and after permission had been refused. Obviously it was taken for the purposes of meeting a criminal case. I do not believe that at the time of delivery these representations were made by the Eyre Smelting Co. Ltd. If, as

the accused now says, he gave delivery because of a misapprehension on the meaning of the letter of the Chief Controller of Purchases of 11th February asking him to deliver tin to Kamani Bros. in anticipation of permission, then there would be no need for asking the Eyre Smelting Co. Ltd. or any one else to absolve him from responsibility.

It is thus clear that all these deliveries were made by the accused deliberately and with the knowledge that he was acting contrary to the order. Mr. Suhrawardy says that there could be no motive in the accused flouting the order as he was not selling at an excessively high price or to persons not authorised to buy this metal. It is not possible to determine what the motive of the accused was, but one might speculate and find many motives which are not honest ones. I do not propose however to ascribe any such motive to the accused. The Crown has not proved any particular motive. All I need say is that if a dishonest motive had been proved the accused would be liable to get a far severer sentence than that which he has got. The maximum sentence is three years imprisonment.

Mr. Suhrawardy pointed out that the appellant had recently lost a great deal of his property by reason of the Japanese occupation of Burma and he says that this loss had so disturbed the appellant's frame of mind as to make him confused. I have taken this factor into consideration but cannot believe that the conduct of the appellant in respect of these offences was influenced by his loss of property in Burma. I take a serious view of this offence. As the learned Magistrate had said the metal tin was vitally necessary for the production of munitions and war materials. The Government had taken definite action to conserve this metal by regulating and controlling its sale. A disobedience of orders passed for this purpose clearly endangered the war effort and any such disobedience requires such punishment as would deter others from indulging in a similar disobedience. I am of opinion that a sentence of fine is not enough and that a sentence of imprisonment also is very necessary; however, having regard to all the circumstances of this case I am not prepared to disagree with my learned brother that the sentence of imprisonment passed should be made simple instead of rigorous. With this modification in the sentence the appeal is dismissed.

GENTLE J.

Upendranath v. Durlav Chandra.

Application in Suit No. 593 of 1927, D/- 24-2-1943.

Bengal Money-Lenders Act (10 of 1940), S. 36 (1)—Agreement not made in mistaken belief of legal rights under Act can be recorded in spite of S. 36 (1) (b).

[P 335 C 2]

ORDER. — This is an application on behalf of the plaintiffs that some terms of settlement which were made between the parties should be recorded and a decree passed in accordance with them. The defendants, who are the respondents, originally relied upon two grounds against the prayers in the application being granted, (i) that the terms were not finally agreed between the parties, and (ii) that even in the event of the terms being agreed, the agreement was made in mistaken belief of the legal rights of the defendants under the Bengal Money-Lenders Act. Reference to some facts is now required. This is a mortgage suit in which a final decree has been passed. On 17th July 1941 the plaintiffs made an application to this Court that the Registrar be directed to sell some of the premises, the subject-matter of the mortgage, and that prices at which he should sell should be fixed. At that time it was alleged, and it is not disputed, that under the terms of the decree sums approximate to Rs. 29,000 and Rs. 2000 were due in respect of principal and interest and in respect of costs. On behalf of the defendants an affidavit was filed dated 29th July 1941, in which it was stated that the original loan which subsequently became, after renewal, the subject-matter of

the mortgage, amounted to Rs. 15,000, and various payments alleged to have been made are set out, including a sum of Rs. 2998 paid before 12th March 1934. In para. 16 of the affidavit the deponent states that having regard to the facts previously set out the defendants pray that relief under the Bengal Money-Lenders Act, 1940, should be given in the manner set out thereunder, and a claim is made that matter should be re-opened and a fresh decree passed under the Act, and the defendants should be released from liability to pay more than 8 per cent. interest and a total sum exceeding Rs. 14,000 which amount should be directed to be paid by 20 equal annual instalments. That being the position learned counsel representing the plaintiffs and the defendants discussed the matter between them it being appreciated at that time, and it seems the position was taken, that there was a claim for relief by the defendants under the Bengal Money-Lenders Act.

Paragraph 22 of the petition in the present application refers to the terms of settlement which, in this paragraph, it is alleged were drawn up and approved by mutual counsel and the parties agreed to the terms. The terms as drawn up and approved were signed by the defendants after they had been explained to them by the Court Interpreter. Reference is made to a position which subsequently arose regarding a guarantor, mentioned in one of the terms, not having signed the document and the matters discussed between the respective attorneys in regard to the guarantor. None of the facts alleged in para. 22 of the petition are denied, and no point is now taken which arose in regard to the guarantor. Paragraph 22 then proceeds to set out the terms of settlement. They provide that the previous decrees made in the suit were thereby re-opened and a new final decree for sale was made upon the following terms: The defendants were to pay to the plaintiffs a sum of Rs. 21,000 in respect of principal and interest, and Rs. 1973 in respect of costs with interest at 6 per cent. The sum of Rs. 21,000 was to be paid by instalments, Rs. 2000 on or before 31st July 1942 and the balance in ten equal annual instalments, the first of which was to be paid by 31st July 1943; and the amount for costs within three years from date. Provision is further made that in default of payment of any two instalments in respect of principal and interest, and in default of payment of the costs, as provided earlier, the mortgage premises should be put up for sale by public auction and the sale proceeds, less costs and charges, should be applied towards payment of the balance of the amount due to the plaintiffs. Other provisions require no reference. It is to be noted that the terms involve the plaintiffs making a total reduction of about Rs. 8000 from the amount which, under the decree itself, they could assert. The terms were arranged at a time when the defendants were claiming the benefits of the Act and reductions in the amounts due under the decree. In argument today, no point has been made that the terms of settlement were made by the defendants in mistaken belief of their legal rights under the Bengal Money-Lenders Act, nor has it been contended that the parties did not agree upon the terms to which reference has been made. The argument has been upon the basis that, assuming the terms were agreed, nevertheless they cannot be enforced. Reference is made to S. 36(1), Bengal Money-Lenders Act, the relevant provisions of which are as follows :

"Notwithstanding anything contained in any law for the time being in force, if any suit to which the Act applies, the Court has reason to believe that the exercise of one or more of the powers under this section will give relief to the borrower, it shall exercise all or any of the following powers as it may consider appropriate, namely, shall—(b) notwithstanding any agreement, purporting to close previous dealings and to create new obligations, re-open any account already taken between the parties; and in consequence, (c) release the borrower of all liability in excess of the limits specified in cls. (1) and (2) of S. 30." It has been pointed out that under S. 30 (1) (a), the borrower is not liable to pay

more than double the amount of the original advance in respect of principal and interest. Whilst in the affidavit filed on behalf of the defendants in the application made in July 1941, it is stated that the original loan was Rs. 15,000 made in 1921 or 1922, in the affidavit filed by the same deponent, Durlav Chunder Kundu, dated 2nd February 1943, to which reference has been made and upon which reliance is placed in the present application, it is therein alleged that the original loan was made in 1915 of a sum of Rs. 8000 and all subsequent transactions including the mortgage itself were in renewal of the first transaction. The facts or matters upon which, for the purposes of argument, no contest has arisen are that the plaintiffs admit that they have received a total sum of about Rs. 13,500. The defendants, for the purposes of argument, agree and for this purpose alone, that Rs. 15,000 was the original advance, the plaintiffs allege it was a sum of Rs. 16,000. Assuming it was the larger amount, double that sum is rupees 32,000, Rs. 13,500 having been paid, as the plaintiffs admit, they cannot recover more than about rupees 18,500 together with costs, consequently, it is contended by the defendants that the sum of Rs. 21,100, which is the amount which is payable under the terms of the agreement, is one which is in conflict with the provisions of the Bengal Money-lenders Act. That being so, it is further argued that this Court should not direct the recording of the terms of settlement which were made between the parties in the course of the application for sale of some of the mortgaged premises. This argument is based upon the words in S. 36 (1) (b), Money-Lenders Act, "notwithstanding any agreement, purporting to close previous dealings and to create new obligations, re-open any account already taken between the parties." The application is made under the provisions of O. 23, R. 3, Civil P. C., which provides: "Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit." It is pointed out, on behalf of the plaintiffs, that the wording of the above rule is mandatory, and upon the Court being satisfied of the adjustment and that the adjustment is a lawful agreement, it shall order such agreement to be recorded. In 57 I. A. 133,¹ in respect to O. 23, R. 3 of the Code their Lordships of the Judicial Committee of the Privy Council observed as follows at page 143:

"The words of the rule do not in terms appear to confer a discretion on the Court, but their Lordships desire to say nothing to prejudice a contention that the Courts retain an inherent power not to allow their proceedings to be used to work a substantial injustice—In the present case no injustice of any kind was established, and as it was established that the suit had been adjusted either wholly or in part by a lawful compromise, it was the duty of the Court to record the agreement and pass a decree in accordance therewith." The contention on behalf of the defendants that the terms of compromise should not be recorded goes as far as this: that in a suit by a borrower for relief under the Bengal Money-Lenders Act, which the defendants are entitled to present, under the provisions of S. 36 (1) of the Act, if the parties agree upon the relief and the terms of the decree in that suit, and a decree is passed accordingly, upon the borrower becoming aware that he has not received full benefit which the Act gives him, proceedings can be taken to reopen the decree passed by reason of the agreement made between the parties. In the present matter before me the terms were agreed in the course of proceedings in which the defendants claimed benefits which the Act gives to borrowers and the agreement was made upon the basis of the claims which were then asserted. The provision in S. 36 (1) (b) enabling the Court to

1. (30) 17 A. I. R. 1930 P.C. 158; 57 I. A. 133, *Sourendra Nath v. Tarubala Dasi*.

reopen any account taken between the parties notwithstanding any agreement purporting to close previous dealings, in my view, does not prevent, in the present circumstances, the plaintiffs names (getting?) recorded the agreement which was made, and which terminated the disputes between the parties as they existed in 1941. I cannot find that the agreement was an unlawful agreement, nor that it has worked or will work a substantial injustice. In my view the prayers which are sought in the application before me should be granted, and consequently the terms of settlement should be recorded and there should be a decree in accordance therewith. The plaintiff-applicant's costs may be added to the amount due to them under the decree, and the defendants will bear their own costs.

GENTLE J.

Official Trustee, Bengal v. L. Chippendale.

Suit No. 2105 of 1940, D/- 17-2-1943.

(a) Transfer of Property Act (1882), Ss. 3 and 130 and Trusts Act, Ss. 5 and 6—Provident fund amount payable after retirement and not presently—It can be subject-matter of trust—It is actionable claim within S. 3, T. P. Act, and there is beneficial interest of settlor in it—Trust of such fund though not registered is valid though precise amount not ascertainable on date of trust.

(b) Trusts Act (1882), Ss. 5 and 6—Provident fund—Rules providing for restrictions on assignment—Rules held prohibited transfer of money standing to credit of member while in service—Transfer of money to which settlor would be entitled after retirement was not prohibited—Such amount can therefore be subject-matter of trust.

JUDGMENT.—This suit arises out of a deed of settlement dated 11th June 1928 purporting to create a trust, which deed was executed by the late Thomas Sansoni to whom reference hereafter can conveniently be made as "the settlor". The settlor was twice married. By his first marriage he had two daughters, the defendant and Miss Phyllis Anne Sansoni, and one son named Paul. The issue by his second marriage was one daughter, Hope Enid, now Mrs. Douglas. The settlor separated from his second wife about 30 years ago. It has been stated that the second wife died in July 1939, a few weeks after the death of the settlor. After he had separated from his wife he lived with a Miss Daisy Mackintosh, who was known as Mrs. Thomas, and by whom he had three children. Miss Mackintosh lived in Calcutta, and the relationship between her and the settlor continued for about 30 years. For the major portion of this time the settlor stayed each week end with Miss Mackintosh, but from the year 1935, about the period he retired from his occupation, until his death in 1939, he lived entirely with Miss Mackintosh. He died intestate on 12th June 1935, at the age of 74. His death took place at Miss Mackintosh's house, and all the children of his two marriages survived him. The settlor made no provision for the maintenance of Miss Mackintosh and her children although he had maintained them entirely during the period of his association with this lady. Some time before his death he told Miss Mackintosh that he intended to make, or he had made, a deed by which he would leave her with provision for the future. He kept his documents in a despatch box, and upon his death and when the box was opened, a typed copy of the deed was found, amongst other papers, upon which he had written in pencil "On my death body to be cremated."

The settlor was over 50 years in the employment of the India General Navigation & Railway Co., Ltd., hereinafter called "the company." This Company has a Provident Fund Institution (which I will conveniently call "the Fund") of which the members are the servants of the company. The settlor was a member, and had been a member, for more than 19 years prior to the year 1928. Upon his retirement from ser-

vice with the company in 1935 he was paid a sum of Rs. 72,468, being the amount due to him and as credited in his account in the books of the Fund. Of this sum, Rs. 10,865 was the amount of his own contributions, the balance being represented by contributions made by the company, profits and interest. It is perhaps convenient to record that on 11th June 1928, the date of the deed, to which reference will be made later, the amount credited in his favour was a sum of Rs. 35,165, of which Rs. 9828 represented his own contribution, Rs. 7752 the amount of the company's contribution, and the balance of about Rs. 17,500, the profits and interest upon the two contributions.

Between the dates when he received the Provident Fund monies and his death the settlor purchased securities of the total value of about Rs. 53,000. When he died he also had a credit bank balance of Rs. 708. It is common ground that these investments and the bank balance represented part of the monies which were paid to him by the fund, and it would seem he had spent the balance. It is now convenient to refer to the deed of 11th June 1928. This is made between the settlor, (who therein is so described) on the one part, and the settlor again and one Nelson Mayhew Vaughan (therein described as the trustees). The deed recites that the settlor was desirous of settling the amount to which he would be entitled as a member of the Provident Fund of the Company, which amount he estimated at Rupees 33,000 or thereabouts, and the household furniture belonging to him at his death, which he valued at Rs. 1000 and all additions according to the Fund or which might otherwise become payable to him by the Company upon the trusts thereafter declared. It was witnessed that in consideration of natural love and affection and other good causes and consideration the settlor did thereby assign and transfer unto the trustees all that sum of Rs. 33,000 or thereabouts and any other monies to which on his retirement from the service of the company he might become entitled as a subscriber or member of the Fund and also household furniture then or thereafter belonging to him. And all the estate, right, title, interest, claim and demand whatsoever of the settlor into and upon the said monies and furniture to have and to hold the same unto the trustees upon the trusts thereafter declared, namely: (1) The trustees should collect and receive the said Provident Fund money and any additions, or accretions thereto; (2) the trustees should pay the interest or income thereof to the settlor and should allow him the undisturbed free use of the furniture during his life; (3) after his death and after payment of his funeral expenses and debts, pay out of the capital and income of the trust monies Rs. 18,000 to Miss Mackintosh absolutely, and the balance of the capital and income to the settlor's daughter, Miss Phyllis Anne Sansoni and make over the furniture to her absolutely. The deed also provided that it should be lawful for the settlor at all times by any deed to alter or revoke all or any of the trusts declared by those presents and to declare any new or other trusts.

In the written statement the factum of execution of the deed was either not admitted or denied. The two executants are the settlor and Mr. Vaughan, the two attesting witnesses being Mr. McNair, a solicitor, and Mr. P. B. Das, his clerk. The two executants and one attesting witness, Mr. McNair, are dead, and the whereabouts of the other attesting witness are unknown. I am satisfied from the evidence of Miss Mackintosh and of Mr. Roy Chowdhury that the deed bears the signatures of the two executants and the two attesting witnesses, and that the deed was properly executed. Learned counsel in his address to me on behalf of the defendant did not direct any argument to the contrary. Some letters written by the defendant and Miss Sansoni and a record of the attendance of these two ladies and others at a solicitor's office shortly after the death of the settlor have been exhibited, from which it would seem that these ladies, at that time, were not intending

to dispute or attack the validity of the deed of settlement. Another letter which was written by the son of the settlor by his first marriage has also been filed in which he requests that the validity of the deed should be disputed. These documents, in my view, do not effect in any way the matters which come before me for consideration.

Letters of administration of the settlor's estate were granted to the defendant on 30th May 1940, and in this suit she is sued as the administratrix of the estate of her deceased father, and in that representative capacity. At the time the suit was instituted Mr. Vaughan, the co-trustee with the settlor, was still alive and he instituted the present proceedings as trustee. He died in December 1941, and by orders of this Court the Official Trustee of Bengal has been substituted as the trustee of the trust, if there is a trust, created by the deed of settlement and also as the plaintiff in the suit in the place of Mr. Vaughan. No question now arises regarding the substitution, and the contention on behalf of the defendant was abandoned by learned counsel, Mr. Chowdhury, that the suit had abated before the substitution of the Official Trustee of Bengal as plaintiff in the suit. The plaintiff claims: (1) possession of the cash at the settlor's bank at the date of his death, and the securities purchased by the him during his lifetime out of the monies he received from the Provident Fund; (2) a decree for the sum of Rs. 72,468-4-8; alternatively a decree for the sum of Rs. 18,941-11-6; (3) accounts, if necessary; (4) the interest. The defences which are now raised can be summarised as follows:

(1) The deed did not operate to create a valid trust; (2) it was not operative to transfer any property, and none was transferred to the trustees; (3) the settlor did not divest himself of any property by the deed; (4) the deed was never acted upon, and the trust was never perfected; (5) the deed is not registered, and therefore cannot be enforced. Reference to the relevant rules of the Provident Fund can now conveniently be made:

5 (1) Every member shall subscribe a sum of 5 per centum per mensem on the amount of his salary. 5 (2) Any member may subscribe a further sum not exceeding $7\frac{1}{2}$ per centum per mensem on the amount of his salary, which voluntary contribution can be reduced or can cease upon notice given to the Managers; 7. The subscriptions of any member absent on sick leave or furlough shall be assessed on the salary allowed during such absence if desired by the member. 8. In respect of each year in which the profits of the company exceed the sum required to pay interest at the rate of 5 per centum upon the issued Share Capital there shall be contributed by the company to the Provident Fund out of the excess net profits, but not otherwise a sum equal to the aggregate amount of compulsory and voluntary subscriptions of members for such year, such contribution shall not exceed an amount equivalent to 5 per centum of the net profits for the year, and the company shall be at liberty, without any obligation to do so, to make up the deficiency of any of its yearly contribution out of the profits in any subsequent year. 9. All sums contributed by the company under R. 8 shall be appropriated among the members (i) in the event of the contribution not exceeding the aggregate amount of the compulsory subscriptions the amount should be divided among the members in proportion to the amount of their compulsory subscription; (ii) in the event of the contribution exceeding the aggregate amount of the compulsory subscriptions there shall first be a division amongst the members to the amount of their respective compulsory subscriptions and out of the surplus a second division amongst the members who elected to increase their subscriptions for that particular year beyond the compulsory amount in proportion to the amount of the voluntary subscriptions, and the managers shall credit the account of each member with his share of the contribution; (iii) for purposes of such appropriations the contributions shall be deemed to have been paid by the company on 31st December in each year, and for purposes of the rules the account of each member shall be deemed to have been credited with his res-

pective share of the contributions as on 31st December.

11. Except as provided by the rules no member nor any person or persons on his behalf or in respect of his interest shall be entitled to claim any payment of money to him or them.

12. (So far as is material in the present case) upon the termination of the services of the settlor the managers shall pay to him the total amount of the credit standing in his favour in the books of the fund.

14. If the member's services with the company were terminated by reason of misconduct the managers shall pay to him the amount of the subscriptions which he should actually then have paid.

20. No member shall be entitled in any way to assign, transfer or deal with by way of security or otherwise any money standing to his credit in the books of the institution and any attempted assignment, transfer or transaction shall be invalid, and the trustees and managers shall not recognise or be bound by any notice to them of any such attempted assignment, transfer or transaction.

25. The funds and moneys of the institution shall be vested in the trustees."

Before proceeding further it is desirable to set out the provisions of Ss. 6 and 5, Trusts Act. Section 6 is as follows :

"Subject to the provisions of S. 5 a trust is created when the author of the trust indicates with reasonable certainty by any words or acts : (a) an intention on his part to create thereby a trust ; (b) the purpose of the trust ; (c) the beneficiary, and (d) the trust property ; and (unless the trust is declared by will or the author of the trust is himself to be the trustee) transfers the trust property to the trustee."

S. 5 : "No trust in relation to immovable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered or by the will of the author of the trust or of the trustee. No trust in relation to moveable property is valid unless declared as aforesaid or unless the ownership of the property is transferred to the trustee."

Considerable argument was addressed to me on several aspects arising in the course of this suit. It was contended on behalf of the defendant that the money standing to the credit of the settlor in the Fund was not a debt, either presently or payable in future or upon a contingency. It was argued that the amount of the credit varied from time to time, and the amount which would be due would not be known until either retirement from service of the settlor or his death, and it was not a liquidated sum. The variation in the amount would depend whether the settlor made or continued to make a voluntary contribution in addition to the compulsory contribution ; whether the company was able to pay any contribution and the amount of it, which payment is dependent upon its ability to pay a dividend of 5 per cent. upon the issued share capital and having surplus profits thereafter ; the decrease in the contributions of the settlor by reason of his absence on account of sickness or furlough and a consequent reduction in his monthly payments ; and also if he were dismissed from the company's service on grounds of misconduct, he could claim only the amount of his own contributions to the Fund and not the amounts contributed by the company which stood to his credit in the books.

Two authorities were cited: 22 Mad. 139¹ and

1. ('99) 22 Mad. 139, *Sabju v. Noordin*.

40 Mad. 31.² Those cases considered the meaning of debt in the Succession Certificate Act and S. 25, Contract Act, respectively and it was held in respect of taking of partnership accounts in the first case and taking of accounts by an arbitrator in the second case that the amount which subsequently would become due was not a debt ; it was not liquidated, and it was not a sum payable in respect of a money demand recoverable by action.

It was further contended that there was no beneficial interest of the settlor in his credit in the Fund which he could assign. Reference was made to R. 25 which provides that the funds and monies of the Provident Fund institution should be vested in trustees, and it was, therefore, argued that since the rules provided for such vestment, there could be no debt due to the settlor from the Fund.

Section 3, T. P. Act, defines an actionable claim as meaning a claim to any debt whether such debt be existent, accruing, conditional or contingent. An actionable claim is transferable with or without consideration by the execution of an instrument in writing under S. 130, T. P. Act. A note to this section in Edn. 2 of Sir Dinshaw Mulla's work upon the Act, p. 690 states that "both present and future debts are existing debts and are actionable claims." The monies standing to the credit of the settlor were monies which were payable to him, not immediately or each year whilst the credit was running, but upon the happenings of the events provided in the Rules. The credits were obtained by payments made to the fund by the settlor himself as a member and by him being given the benefit of some of the contributions made by his employers, and profits and interest upon the monies. For the purpose of analogy, reference can be made to a customer of a bank who places a sum upon a fixed deposit account repayable by the bank after the elapse of a specified period. Throughout the time the money is deposited there is a debt due to the customer by the bank, but it is not enforceable and the debt becomes payable only after the agreed period of the deposit. In the same way payment of the amount of a member's credit in Provident Fund could only be demanded, as R. 12 provides, upon retirement, which is the only event with which we are concerned. Between the making of each deposit and retirement, the debt is accruing and payment is at least conditional or contingent inasmuch as it arises upon the happening of the prescribed event which gives rise to payment being able to be demanded.

In my view the credit in favour of each member, including the settlor, in the books of the Provident Fund was an actionable claim as defined by S. 3, T. P. Act. Further, each member has a beneficial interest in his credit in the Fund which is also an actionable claim as defined by the above section of the Transfer of Property Act.

The vesting of the monies of the fund in trustees pursuant to R. 25, does not alter the position. The money must vest in someone while with the fund. In the same way when a customer pays money into his account in the bank, the money he pays then vests in the bank, but he is entitled, either upon demand or upon the expiration of any specified period to demand payment from the bank. The bank uses the money de-

2. ('18) 5 A. I. R. 1918 Mad. 1145 : 40 Mad. 31 (F.B.), *Doraisami v. Vaithilinga*.

posited with it for its own purposes whilst it is in deposit. In the same way the trustees would use the money for investment and to make further profits for the fund.

It was argued that the trust property is not indicated with reasonable certainty in the trust deed, and consequently compliance with S. 6 of the Act has not been made. This section, the provisions of which are set out earlier, requires, for a trust to be created, that the author should indicate with reasonable certainty his intention to create a trust, its purpose, the beneficiary, and the trust property. It is conceded that the first three are satisfied, but it is argued that the trust property is not indicated with reasonable certainty.

At the date when the deed was executed on 11th June 1928, the settlor was in credit with the fund to the extent of Rs. 35,000; in the deed he estimates this amount as Rs. 33,000 or thereabouts. As mentioned earlier, it was argued that at the date of the deed the amount could not be ascertained which would be payable to him upon retirement since it would depend upon several factors, for example, the ability of the company to make contributions during the intervening years. It was therefore contended that since the amount which the credit would represent at the time when it became payable could not then be determined, the settlor had not indicated, with reasonable certainty, the trust property. There is certainty in every other respect regarding the trust property, its origin, its nature and so on. The only point upon which uncertainty was alleged was the quantum. It is to be noticed that S. 6, Trusts Act, does not use the words "exact" or "precise," or language to that effect. It requires the property to be indicated with reasonable certainty. In Vol. 33 of Halsbury's Laws of England, 2nd Edn., p. 100, para. 164, it is stated as follows:

"In order to raise a trust, the property to be affected by it must be either expressly designated or so defined that it is capable of being ascertained. Otherwise the trust is void for uncertainty. A trust of the residue of a fund after a gift thereof of an undefined amount for an object which for any cause fails will be an effectual trust of the whole fund."

Then para. 165: "A trust may be declared of a fund contingently on the fund subsequently coming into existence." Reference is made to (1836) 1 My. & Cr. 401.³ Again in (1889) 40 Ch. D. 5:⁴

"A marriage settlement contained a covenant by the settlor to settle his estate and interest in any property or estate of or to which he should become possessed or entitled during the marriage by devise, bequest, purchase, or otherwise."

He afterwards effected some policies of insurance on his life and it was held that these policies were property to which the settlor had during the marriage become entitled by purchase within the specific words of the covenant in the marriage settlement and the trust could be enforced as to that property. In that case the description of the trust property was much wider than it is in the deed of settlement executed by the settlor and the amount or value was not indicated.

In my view the property has been indicated with reasonable certainty and the trust does not fail, because at the date of the trust deed, the

precise amount of the fund over which a trust was then sought to be created was not actually ascertainable. So far as S. 6, Trusts Act, is concerned, I am satisfied and I hold that the deed fully complies with all its provisions.

It was further urged that the deed of settlement is an assignment which is prohibited by R. 20 and the attempt to assign the settlor's credit in the fund is invalid as the rule so provides. The exact provision of the rule is required to be considered. It is that no member is entitled to assign any moneys standing to his credit in the books and the trustees and managers shall not recognise or be bound by notice of any attempted assignment. In the operative portion of the deed of settlement, the settlor purports to assign the sum of Rs. 33,000 and other moneys to which he might become entitled as a subscriber or member of the fund upon his retirement. It is an assignment of such sum to which he might become entitled at the date of his retirement; there is no assignment of the sums in credit at the date of the execution of the deed which R. 20 purports to prohibit and which it purports to enact shall be void. Further, in the rule there is also a provision that the trustees and managers shall not recognise or be bound by any notice to them of any attempted assignment. A provision of a somewhat similar nature was contained in a policy of insurance which was considered by the English Courts in (1889) 40 Ch. D. 5.⁴ In the course of the judgment at p. 10, Cotton L. J. observed as follows:

"There was another point argued about which we had some doubt, arising out of the condition annexed to the policy for £1000 that it should not be in any case assignable. But the policy contains another condition, showing that the insurance office recognised the right of the insured to part with his interest, for it provided that the company should not be bound by notice of liens and charges on the policy. Would a Court of equity in the lifetime of the covenantor have enforced the covenant to settle this policy notwithstanding the condition against assignment? I think it would."

Whether the provisions of R. 20 of the fund make an assignment of a credit invalid as against the assignee, does not require to be examined or decided. The deed is not an assignment which this rule contemplates and therefore is not voided by the rule.

Another argument, on behalf of the defendant, was that the trust was never acted upon and that it was never perfected. It is correct that upon his retirement the settlor himself received the moneys payable to him from the fund and it does not appear that the co-trustee, Mr. Vaughan, in any way participated or attempted to participate in the management of the trust property or of the investments or the spending of the moneys received from the fund. When a person creates a trust, which trust can be enforced against him, he can be made to carry out the trust; if he fails to abide by his obligation it cannot then be said that the trust has not been acted upon, or in other words that it has been abandoned and in consequence it has lapsed or ceased to be enforceable. In the trust deed there is a provision which enabled the settlor by deed to alter or revoke all or any of the trusts declared and to declare any new or other trusts. He never executed a deed of alteration or revocation. He died 11 years after the execution of the trust deed, and amongst the documents which he kept locked in a despatch box, there was

3. (1836) 1 My. & Cr. 401, *Woods v. Woods*.

4. (1889) 40 Ch. D. 5, *In re Turcan*.

found a typewritten copy of the trust deed. Further, he told Miss Mackintosh, and I accept her evidence, that he intended to make or he had made a deed by which he would make provision for her. These factors, particularly the failure to execute a deed of revocation and the retention of a copy of the trust deed, shew the settlor's intention to continue the trusts and that they were to remain in force. Whilst there was not the formality of the purchase, with the provident fund moneys, of trust securities in the names of the settlor and Mr. Vaughan as the trustees, the fact that the settlor received the moneys, invested them — or the major portion of them — in his own name and received the income therefrom, does not support the contention that the trust was never acted upon. He was entitled, under the trust deed, to enjoy the income from the trust during his life.

Section 5, Trusts Act, requires that a trust, in relation to moveable property, shall be declared by a non-testamentary instrument unless the ownership of the property is transferred to the trustee. The question whether a non-testamentary instrument in respect of a trust of moveable property requires registration, need not be discussed. It is conceded that if the ownership in trust property is transferred to the trustee, registration of the instrument is not required. The operative part of the deed of settlement assigns to the trustees the moneys to which the settlor might become entitled to receive upon his retirement from the service of the company. I have already said, and in my view, the money credited to the settlor in the fund was a debt. Further, he had the beneficial interest in that credit. Both the debt and the beneficial interest are actionable claims, as defined by S. 3, T. P. Act, which actionable claims are transferable under S. 130, T. P. Act, and which is effected by the execution of an instrument in writing signed by the transferor. The deed of 11th June 1928, is an instrument within the above section. There was, therefore, in my view a transfer of trust property by this deed, from the settlor to himself and to Mr. Vaughan as trustees.

In my opinion, the provisions of the Trusts Act have been fully complied with, and the deed created a trust on the terms and for the benefit of the cestui que trusts mentioned in it and it is an operative and enforceable trust. Having come to the conclusion that the property in the trust was transferred, it is not necessary for me to express any opinion regarding the necessity or otherwise for the trust deed to have been registered or whether S. 5, Trusts Act, makes it obligatory for a non-testamentary instrument declaring a trust of moveable property to be registered.

The result of the above is that there will be a decree for the plaintiff that the defendant will deliver to the plaintiff within two weeks the securities set out in annexure (b) to the plaint and also any moneys coming into her hands belonging to the estate of which she is the administratrix.

In my view, this was a proper case for both parties to contest and that the costs of the plaintiff and the defendant should be paid out of the trust fund. The defendant's costs will include the costs and expenses which have been incurred by her and to which she has been put in obtaining the grant of letters of administration and furnishing security as required by this Court. Both sets of costs will be taxed as between

attorney and client. The fees and charges of Government will be a first charge upon the subject-matter of the suit.

R.K.

Order accordingly.

A. I. R. (31) 1944 Calcutta 339

KHUNDKAR J.

on difference between

LODGE AND DAS JJ.

Ibra Akanda and others — Appellants
V.

Emperor.

Criminal Appeal Nos. 28, 98 and 104 of 1943,
Decided on 8th February 1944.

(a) Penal Code (1860), Ss. 34 and 304, Part II — "Common intention" in S. 34 explained — Offence punishable under S. 304, part. II—S. 34 can be applied — Scope of Ss. 304 and 34 discussed (Per *Khundkar and Lodge JJ., Das J. contra.*)

(Per *Khundkar and Lodge JJ., Das J. contra.*) — "Common intention" cannot be given a constant connotation. What it actually is, varies with the facts of each case. There are cases in which it is identical with the mens rea required for the offence actually committed. There are others in which its horizon is wider, where the real common intention was to do a criminal act the accomplishment of which might require some other criminal act to be committed. In these cases the mens rea which makes the ancillary act a crime would be regarded as embraced by the common intention, not as a primary intention, but as a secondary and contingent intention, not in the forefront of the conscious mind, but latent or dormant therein. It cannot, therefore, be said that the principle of S. 34 can never be applied to an offence punishable under part II of S. 304.

[P 341 C 1 ; P 353 C 2; P 354 C 1; P 363 C 2]

(b) Criminal P. C. (1898), S. 162—Information from witnesses recorded in index to map — Information obtained during police investigation — It must be proved by evidence of those witnesses and not of investigating officer — If it is admitted in latter case S. 162 is offended — Defect cannot be cured by S. 167, Evidence Act. (Per *Khundkar and Das JJ., Lodge J. contra.*)

In the index to the sketch map prepared by the investigating police officer occurred the statement "A is the house of Manikulla Munshi, 7 rashis west from the place of occurrence and where witnesses assembled for certain enquiry" :

Held (Per *Khundkar and Das JJ., Lodge J. contra.*) that the fact that the house of Manikulla Munshi was 7 rashis from the place of occurrence was a fact which the investigating officer presumably ascertained by personal observation. Hence the fact should have been established by the evidence of the officer at the trial. The importing of the fact into the record from the map and the index and the evidence of the investigating officer was a clear violation of the provisions of S. 162, Criminal P. C. Information derived from witnesses during police investigation, and recorded in the index to a map, must be proved by the witnesses concerned, and not by the investigating officer. If sought to be proved by the evidence of the latter, this kind of information would manifestly offend against S. 162, Criminal P. C. It was impossible to say that the verdict was not influenced by what was contained in the index of the map. The defect cannot be cured by S. 167, Evidence Act.

[P 341 C 1; P 346 C 2; P 364 C 1]

(c) Criminal trial—Direction to jury—Diary of one accused allowed in evidence to show enmity against complainant and put before jury—(Per *Lodge J.*) There was no misdirection as entry itself was placed before jury—(Per *Das J.*) There was misdirection as inimical conduct of one accused had been attributed to all.

An entry in the diary of one of the accused was admitted in evidence to show that the accused had hostility with the complainant. The Judge while directing the jury stated that the entry was made at the instance of the accused instead of stating that it was made at the instance of one of them. There was no other defect in the direction :

Held (Per *Lodge J.*) that inasmuch as the entry itself was placed before the jury they could not have been misled. [P 340 C 2]

(Per *Das J.*) that there had been a material misdirection in relation to the diary. [P 346 C 2]

(d) Criminal trial — Misdirection to jury — Charge omitting to mention that first information report can be used for falsifying prosecution story — *Held* (Per *Das J.*; *Lodge J.* contra.) omission was grave error of law.

The Judge in his charge to the jury explained that the first information report should be used not as substantive evidence, but for other subsidiary purposes like corroboration of prosecution evidence, etc. The Judge in his charge referred to the report 11 times as supporting the prosecution case but only once to show that a certain statement of a prosecution witness was not noted in the report :

Held (Per *Das J.*) that the Judge did not bring it to the notice of the jury, generally or even in connexion with the last mentioned omission, that the first information report could also be used for the purpose of contradicting and falsifying the prosecution story. This omission, by itself, would, in the circumstances of such a case, be sufficient to vitiate the verdict. [P 346 C 1]

(Per *Lodge J.*)—that the omission would not be of any importance in the present case. [P 340 C 2]

Dinesh Chandra Roy for S. S. Mukherjee and Biswanath Dhar, Amicus curiæ (in 28 & 104.)

Dinesh Chandra Roy, S. C. Talukdar and Biswanath Dhar — for Appellant (in 98).

Anil Ch. Roy Chowdhury, Gopal Chandra Shome and Sailendra Nath Mitra—for the Crown (in all).

LODGE J. — This is an appeal from convictions and sentences under S. 304 (2), Penal Code, read with S. 34. The four appellants were tried by the Sessions Judge of Pabna and Bogra and a common jury. There was a charge under S. 304/34 against all four appellants, and a separate charge under S. 324, Penal Code, against appellant Ibra Akanda. The jury returned a unanimous verdict of guilty under S. 304 (2)/34, Penal Code, against all four appellants, and of not guilty in respect of the separate charge under S. 324, Penal Code, against Ibra Akanda. The learned Judge agreed with and accepted this verdict; he acquitted Ibra Akanda of the charge under S. 324, Penal Code, and convicted all four accused on the remaining charge. He sentenced Ibra and Rayis, appellants, under S. 304 (2)/34, Penal Code, each to undergo rigorous imprisonment for ten years; and in view of the age of the one and the youth of the other, he sentenced Abad and Josi under S. 304 (2)/34, Penal Code, each to undergo rigorous imprisonment for five years. Hence this appeal.

The prosecution story is briefly as follows :

On 8th June 1942, Mafiz of Narayanpur, P. S. Dhunat was returning home from the hut at about sunset. He was waylaid by the four appellants, who all belong to one family, Ibra Akanda,

appellant, stabbed him with a spear (fala) and the other appellants belaboured him with lathis. At that time a constable and some other men were assembled in the house of Manik Munshi near by, in connexion with the investigation of a theft case. Attracted by Mafiz's shouts they came to the place of occurrence, recognised the assailants and heard Mafiz's account of the incident. Mafiz was carried home, but died about two hours later. The usual investigation followed, and charge sheet was submitted against the four appellants with the result stated above.

Mr. Sudhansu Mukherjee appeared as *amicus curiæ* and argued the appeal on behalf of the appellants, and drew our attention to a number of alleged defects in the charge. He also placed before us all the authorities bearing on the interpretation of S. 34, Penal Code, which was the most important question raised in this appeal.

Mr. Mukherjee complained that in the charge to the jury the learned Judge, in discussing the first information report observed :

"The first information report should be used not as substantive evidence but for other subsidiary purposes such as corroboration of prosecution evidence etc."

and the learned Judge did not emphasise that the first information report might also be used to contradict the prosecution evidence. An examination of the record shews that not a single question was put to the first informant, indicating that the first information report contradicted his evidence in Court. In other words, no attempt was made in this case to use the first information report for the purposes of contradiction, in the only way sanctioned by law.

Therefore if it were justifiable to infer from the use of the term, etc., and the absence of specific reference to contradiction in the heads of charge, that the jury were not instructed on this point, the omission would not be of any importance in the present case.

Mr. Mukherjee next drew our attention to the following passage in the charge :

"Exhibit 5(a) another diary entry, dated 24th June 1942. This has been admitted to show that the accused had hostility with the complainant. This is an entry at the instance of the accused party making certain allegations against Mafiz and his brothers."

Mr. Mukherjee has argued that this is in effect using the statement of one accused as evidence against his co-accused and is therefore wrong. I am not impressed by this argument at all. Exhibit 5 (a) has not been used as evidence of the truth of its contents. It is merely an instance of conduct on the part of one accused, cited as evidence of enmity felt by all the accused. The entry (irrespective of its truth or falsehood) is certainly proof of conduct indicating enmity on the part of the informant; and the Courts are continually being asked to hold that proof of enmity on the part of A against B is usually evidence of enmity on the part of A's brothers and relatives against B.

The direction merely contains a slight verbal inaccuracy inasmuch as it states that the entry was made at the instance of the accused instead of stating that it was made at the instance of one of them. There is no other defect in the direction; and inasmuch as the entry itself was placed before the jury, it is obvious that they could not have been misled.

Mr. Mukherjee next referred to the map and index prepared during investigation. In the index occurs the following :

"A is the house of Manikulla Munshi 7 rashis

west from place of occurrence and where witnesses assembled for a certain enquiry."

It is argued that this contains a statement made to a police officer during investigation and is inadmissible under S. 162, Criminal P. C.

It was in evidence that a police constable was in Manikulla Munshi's house holding an enquiry into a theft case at the time of the occurrence. This fact was not disputed by the defence. It is true that some of the prosecution witnesses were cross-examined to shew that they were not present at the enquiry in Manikulla's house; but there is nothing to indicate that the assembly in Manikulla's house was denied.

The statement in the index does not indicate that any of the individuals examined as prosecution witnesses in this case were at Manikulla's house at that time.

In these circumstances, even if it be conceded that this statement in the index was inadmissible, owing to the provisions of S. 162, Criminal P. C., it seems to me obvious that the statement could not have affected the verdict of the jury.

Mr. Mukherjee next commented on the omission of the learned Judge to give any caution to the jury regarding Ex. 1 the entry in the diary of the constable of a statement made by the injured man regarding the identity of his assailants. I am unable to hold that there was any misdirection to the jury on this point.

The most important criticism of the charge to the jury was regarding the learned Judge's explanation of the law as contained in S. 34, Penal Code.

It has been argued that S. 34, Penal Code, cannot be read together with S. 304, part 2, Penal Code; that the verdict of the jury finding the accused guilty under S. 304 part 2 read with S. 34, Penal Code, is self-contradictory and therefore erroneous; and that the verdict is erroneous owing to misdirections in the charge as to the meaning of S. 34, Penal Code.

This question has come before the Court on a multitude of occasions. A few of the cases are reported; the great majority have not been reported. Some learned Judges have found no difficulty in combining S. 34, Penal Code, with S. 304 Part 2; other learned Judges seem to think that the two sections cannot be combined; still other learned Judges have expressed the opinion that though cases can be imagined in which the two sections may be combined, such cases must be rare and due to a combination of circumstances which is almost incapable of arising in real life.

I propose to examine the sections with some care to explain why, in my opinion, there is no difficulty whatever in combining S. 34 with S. 304 (2) or with any other section which punishes an offence requiring knowledge that a particular result will be brought about without an intention to bring about that result.

To understand S. 34, Penal Code, it is necessary to consider Ss. 32, 33, 34, 35, 36 and 38, Penal Code.

By Ss. 32 and 33, the word 'act' includes an omission as well as a 'series of acts.' Section 36 makes it clear that the series of acts may be a series made up partly of acts and partly of omissions.

These sections must be borne in mind when considering Ss. 34 and 35.

Section 34 reads :

"When a criminal act is done by several persons, in furtherance of the common intention of all, each of

such persons is liable for that act in the same manner as if it were done by him alone."

Section 35 reads :

"Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention is done by several persons, each of such persons who joins in the act with such knowledge or intention is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention."

Section 38 reads :

"Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act."

All these sections deal with the case of one act being jointly performed by a number of persons. They indicate that the performers of the joint act may be guilty of different offences (S. 38) and that some of the performers may not be guilty of any offence at all (S. 35).

Neither S. 34 nor S. 35 provides that all who take part in the act are guilty of the same offence; they merely provide that each of the performers shall be liable for the act in the same manner as if the act were done by him alone.

Those learned Judges who have held that it is not possible to combine S. 34 with S. 304 Part 2 have interpreted S. 34 as if it read

"when a criminal act is done by several persons in furtherance of the common intention to commit a particular offence each of such persons is liable for that act as if it were done by him alone"

and they have held that an offender cannot be guilty under S. 304 part 2 read with S. 34, Penal Code, unless there was a common intention to commit an offence under S. 304 part 2.

If the section means that an offender can only be guilty of a particular offence by virtue of this section if there is a common intention to commit that offence, this contention would seem to be correct.

Culpable homicide (S. 299) is defined thus :

"Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

If therefore two or more persons have a common intention to commit culpable homicide they must have a common intention to cause death by doing an act &c. &c. That is to say they must intend to cause death.

But S. 304, part II provides the punishment 'if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death or such bodily injury as is likely to cause death.'

Obviously two or more persons cannot have a common intention to cause death by doing any act . . . without any intention to cause death.

Therefore if a man could only be guilty under S. 304 read with S. 34 if there was a common intention to commit culpable homicide, a verdict of guilty under S. 304, part II read with S. 34 would be a contradiction in terms.

Walmsley J. was obviously taking this view in A.I.R. 1925 Cal. 913¹ when he observed :

"There is yet another objection to the charges and the verdict. It is that S. 34 which is based on a

1. ('25) 12 A. I. R. 1925 Cal. 913, *Aniruddha Mana v. Emperor*.

common intention cannot possibly be used with the second part of S. 304 which expressly excludes intention."

Most, if not all, criminal offences consist of an act intentionally performed, together with a particular result, and the intention to produce that result or the knowledge that that result is likely to be produced.

Even offences punishable under S. 304, part 2 require an act to be intentionally performed. It is not the intention to perform the act which determines whether an offence is punishable under part 1 or part 2 of the section, but the intention to produce the result, i. e., to cause death.

It seems to me that Walmsley J. assumed that because under S. 304, part 2 there must be absence of intention to cause death, there must therefore be absence of an intention to commit a criminal act at all. But if this view were correct, S. 304, part 2 would scarcely be applicable to any criminal offence whatever. In this connexion it is interesting to consider *illus. (d)* under S. 300 (fourthly). The firing of a piece of heavy artillery is a complicated series of acts performed by a gun crew. Is there any doubt that all members of the gun crew would be guilty of murder in this case—though none of them had the intentions set out in S. 299?

Before attempting to state what the section does mean, two illustrations may be considered, e. g., *illus. (1)*: A pushes X into the River Hooghly, with the result that X is drowned. A has no intention to cause the death of X or to cause such bodily injury as is likely to cause the death of X; but A knows that the River Hooghly is such a treacherous river that he is likely by his act to cause the death of X. A commits culpable homicide not amounting to murder (S. 304, part 2). *Illustration (2)*: A and B, two seamen on a ship in the River Hooghly, find X a stowaway in the hold. They bring him on deck and throw him into the river, one holding X by the legs and the other holding X by the head or arms.

Throwing X overboard may be considered one act jointly performed. A and B both intended to throw X overboard. The throwing of X overboard is an act done by two persons in furtherance of the common intention of both. Taking the plain meaning of the words of S. 34, A and B will each be liable as if he alone had thrown X overboard. Therefore if A knows that he is likely by his act to cause death, he will be guilty under S. 304, part 2. If B has no reason to believe that anything worse than a ducking will be the result, he will be guilty of a simple assault under S. 352. A and B may be guilty of different offences: *vide* S. 38.

But if S. 34 requires that both A and B shall have the intention of committing the same offence neither can be guilty under S. 304. Each can be guilty only under S. 352 though A may know that he is likely by his act to cause death.

The words "in furtherance of the common intention of all" did not occur in the section when the statute was first enacted; they were inserted by the Indian Penal Code Amendment Act 1870 "so as to make the object of the section clear" according to the Law Member of the Council of the Governor-General.

Before this amendment, Ss. 34 and 35 were complementary sections laying down similar principles in the case of acts which are criminal in themselves and in the case of acts which are criminal only by reason of their being done with a criminal knowledge or intention.

If the words "in furtherance of the common intention of all" mean "in furtherance of the common intention of all to commit a particular offence" they cannot possibly apply to S. 35 which contemplates that some of the performers of the act may have no intention to commit a criminal offence at all. If however the words may mean only "in furtherance of the common intention of all to do the joint composite act" the words could apply with equal force to S. 35 though they have not actually been incorporated in that section.

If however the words mean "in furtherance of the common intention of all to commit a particular criminal offence" the result is to my mind remarkable. It is as follows:

If a criminal act is done by several persons each of whom intends the joint act and each of whom intends thereby to commit a different offence, nobody will be held liable for the joint act, and each will be held liable only for his individual contribution to the joint act and will be guilty only of attempting to commit the offence which he intends to commit by the joint act.

If however the joint act is of such a nature that one of the participants is wholly innocent, then S. 35 will apply and each of the others will be liable for the entire joint act in the same manner as if the act were done by him alone with his own particular criminal knowledge or intention.

This result seems to me so illogical that it ought not to be accepted if the words of the section can possibly be interpreted otherwise.

It may of course be argued that there are so few acts which are criminal irrespective of whether they are done with a criminal intention or knowledge, that S. 35 is the section which is ordinarily applicable and that S. 34 has in fact been consistently misapplied. In this view the whole argument is merely academic.

Again, if the phrase means "in furtherance of the common intention of all to commit a particular offence," S. 34 becomes merely a particular instance of the wider rule contained in S. 37.

It seems to me that this view, namely, that all the participants in the act must have the common intention to commit the same offence, is inconsistent with S. 38, which clearly provides that the participants may be guilty of different offences. If two persons do the same act intending to commit the same offence and produce the same result they must necessarily commit the same offence.

It should be noticed that S. 38 like S. 34 refers to a criminal act and not to an act which is merely criminal if done with a particular knowledge or intention. In other words, S. 38 is an explanation to S. 34.

I am satisfied therefore, that the phrase "in furtherance of the common intention of all" in S. 34 does not mean that all the participants must intend to commit the same offence.

It has next been contended that if the phrase does not mean that all the participants must intend to commit the same offence, it must mean that they all intended to produce the same result. In the illustration to S. 38 both A and B intended to cause the death of X, and therefore each was liable as if he alone had caused the death of X; and the offences of each were different because there were additional circumstances mitigating A's offence.

The illustration to S. 38 is consistent with this view, but there is nothing in the section to indi-

cate that the section is limited to those cases in which one or other of the participants in the act can prove circumstances bringing his case within one of the exceptions to criminal liability. The words of the section are quite general, and apply equally to cases in which all the participants in the joint act intended the same result, and to cases in which the various participants intended different result from the joint act.

Consider another illustration :

Illustration (3) : *A, B, C* and *D* unite to push a large boulder over a hillside. The boulder crashes down the hillside and causes the death of *X*.

The pushing of the boulder over the hillside may be regarded as one joint act done by *A, B, C* and *D*. Inasmuch as all of them intend to push it over the hillside, the pushing of it over the hillside is done in furtherance of the common intention of all. Therefore according to the ordinary meaning of the words of S. 34, *A, B, C* and *D* are each liable as if he alone had pushed the boulder over the hillside. All four may intend the same offence; or all may intend to produce the same result, without intending the same offences; or each of them may intend to produce a different result.

Let us take an extreme case. Suppose that *A* knows that *X* is just below and in the path which the boulder is likely to take, and intends by the joint act to cause the death of *X*. Suppose that *B* has no knowledge that *X* is below, but knows that there is a road below on which there may be passers-by. Suppose that *C* has no knowledge that *X* is below or that there is a public road below, but does know that there are tea plants belonging to an enemy which he wants to damage. Suppose that *D* is blind and entirely unaware that any damage is likely to be caused. I can see nothing in the plain meaning of the words of Ss. 34 and 35 to prevent a Court invoking those two sections and finding *A* guilty of murder under S. 302, *B* guilty of culpable homicide not amounting to murder under S. 304 part 2 or of causing death by a rash and negligent act under S. 304A, *C* guilty of mischief under S. 426 and *D* not guilty of any offence.

But if S. 34 requires either that all shall intend to commit the same offence, or that all shall intend to produce the same result by their joint act then each of them has merely attempted to commit an offence and *A* might be guilty under S. 307, *C* under S. 426/511, Penal Code.

If I am right in holding that the plain words of the sections apply to such a case as this, is there any reason why they should not be applied? I can see none. I cannot see that any injustice would be done by applying the sections to such a case. On the other hand to hold that only an attempt to commit an offence had been committed by any one in such a case seems to me utterly unreasonable. If I am right in holding that Ss. 34 and 35 apply to such a case, it must follow that the words 'in furtherance of the common intention of all' do not mean that all the participants in the joint act must either intend to commit the same offence or intend to produce the same result by their joint act. It will suffice if all of them intend that the joint act be performed.

The supposed difficulty of applying S. 34 to acts committed by a number of persons has never been considered in such cases as those I have discussed above. It has always been considered in cases where a number of persons have combined to inflict wounds on their victim.

Two illustrations will explain my view of these cases. Illustration: (4) *A* lies in ambush, armed with a lathi. As *X* approaches *A* leaps out from his ambush and belabours him with the lathi. *X* dies from his injuries.

I am aware that some learned Judges consider that S. 304, part 2 cannot apply to such a case, and consider that *A* is guilty either of murder or of voluntarily causing grievous hurt. But this Court has, times without number, approved a conviction under S. 304, part 2 in such a case, holding that *A* knew that he was likely to cause death but did not intend to cause death or to cause such bodily injury as was likely to cause death. In the circumstances, I consider that it must be taken to be settled law that S. 304, part 2 may apply to such a case.

Illustration: (5) *A, B, C* and *D* lie in ambush, armed with lathis. As *X* approaches, they leap out from ambush to belabour him, *A* stumbles and falls : *B, C* and *D* belabour *X* with lathis. Neighbours appear before *A* has time to get up and join in the assault. *A, B, C* and *D* retire. *X* dies from his injuries. It seems to me that if the belabouring of *X* by *B, C* and *D* can be regarded as one act; and if that joint act was intended by *A, B, C* and *D* then each of the four is guilty as if that act was done by him alone. Under ordinary circumstances each would be guilty under S. 304, part 2; but if for any reason, one of them did not know that death was likely to be caused by the joint act, he would be guilty only under S. 325 read with S. 34 and the others might still be guilty under S. 304 read with S. 34.

I can find no greater difficulty in applying S. 304, part 2 to a multiple assault committed by a number of assailants than to a multiple assault committed by a single assailant.

The only questions for determination in my opinion are;

(i) were the individual assaults so connected together as to constitute one criminal act?

(ii) did all the participants intend that criminal act?

(iii) what result did each participant intend to produce by that act or know that they were likely to produce by that act?

The correct interpretation of S. 34, Penal Code, was considered by a Full Bench of this Court in *Barendra Kumar Ghosh's case*,² and again by the Privy Council in an appeal from the decision of that Full Bench.

It is clear that in that case the attention of both Courts was fixed on the words 'criminal act' and there was no express intention of interpreting the words "in furtherance of the common intention of all." Therefore it may not be justifiable to take sentences from those judgments to support any of the views contended for now. Some of the sentences however are definitely in support of the view I take.

The judgment of Cuming J. states again and again that the requirement of the section is that the criminal act shall be the common intention of all.

The judgment of the Judicial Committee contains the following significant sentence.

"Section 37 provides that, when several acts are done so as to result together in the commission of an offence the doing of any one of them, *with an intention to co-operate in the offence (which may not be the same as an intention common to all)*

2. (1924) 11 A.I.R. 1924 Cal. 257 : 38 C.L.J. 411 : 28 C.W.N. 170 (F.B.), *Emperor v.arendra Kumar*.

makes the actor liable to be punished for the commission of the offence."

The words underlined (here italicized) do suggest that the "intention common to all" need not be the same as "an intention to co-operate in the offence."

The only reported decision which seems clearly inconsistent with the view I have expressed is A.I.R. 1925 Cal. 913¹ to which I have referred above. The view expressed in that case by Walmsley J. was considered in 31 C. W. N. 314.³ The learned Judges observed:

"our attention has been drawn to a decision of Walmsley and Mookerjee JJ. (Appeal No. 248 of 1924, decided on 19th August 1924.) In that case there are the following remarks of Walmsley J.:

"There is yet another objection to the charges and verdict. It is that S. 34 which is based on a common intention cannot possibly be used with the second part of S. 304 which expressly excludes intention. Personally I do not think that it could be used with the first part either, except possibly in very rare cases. However the point is that the jury have found the accused guilty of committing culpable homicide by doing an act with the knowledge that they were likely to cause death, but without any such intention in furtherance of a common intention. It is the badly framed charge and the defective summing up that have led the jury to their illogical verdict."

With great respect to the learned Judge I am not quite able to discover whether he did or did not decide the point. He certainly does not discuss it or give any reason for his decision. But it is clear from a perusal of the judgment that the learned Judge decided the case upon other considerations and that the decision of that case did not depend on the interpretation of S. 34. The learned Judge's remarks therefore on the applicability of S. 34 to S. 304, Part 2, may therefore be considered as obiter dicta."

Though the question of the true interpretation of S. 34 has been considered in many reported cases, in the majority of those cases the term "Criminal act" was examined and the Courts did not attempt to explain the meaning of the phrase "in furtherance of the common intention of all."

In 36 Cal. 302,⁴ two soldiers set up a target and fired several shots at it. There was a public road near by, but invisible from the place where the soldiers stood to fire. A bullet struck a man on the public road and caused his death.

This Court held that both accused persons were guilty under S. 304A. The learned Judges observed:

"The law in India is in accord with what was laid down in *Reg. v. Salmon*.⁵ It is unnecessary to call in aid S. 34 or S. 107 even assuming that either of these sections could possibly apply when the facts showed that at the most the accused were guilty of 'negligence' only."

With the greatest respect for the learned Judges who decided that case, I cannot understand how one of the soldiers could have been held responsible for the shot fired by his companion, without invoking Ss. 34 and 35 or S. 114.

On the other hand I find no difficulty in applying S. 34 to the facts of that case, and holding that the firing of a number of shots by the two soldiers was essentially one joint act, that there was a common intention on the part of the two

soldiers that those shots should be fired, and that each of the soldiers was therefore liable under S. 34 as if he had fired all the shots himself. In this view it seems to me, if I may say so with respect, that the decision was clearly correct. But I cannot justify the decision on any other ground.

In 36 Cal. 659⁶ the deceased was way laid by four persons and assaulted out of revenge. The deceased received six injuries including three severe injuries on the head, one of which fractured the frontal bone and was the cause of death.

This Court invoked the provisions of S. 34, but in the circumstances was not prepared to hold that the appellant, who did not strike the fatal blow, must have contemplated the likelihood of such a blow being struck and found him guilty under S. 326 read with S. 34. This decision seems to me consistent with the view I have expressed above. The statement of facts in the report is very brief but it seems that the appellant was held liable for the entire assault as if committed by himself alone, but the nature of his offence was determined by his own knowledge and intention. Otherwise, I cannot understand how he could have been held to have caused grievous hurt.

In 25 C. W. N. 24,⁷ the learned Judges observed:

"In cases of the present type when two or more persons join actively in an assault on a third person, there is ample authority for the view that they are directly responsible for the injuries caused to the extent to which they had a common intention to cause those injuries, and what their common intention was must be gathered from the circumstances."

This statement is sufficiently accurate for the majority of cases, where the intention of each assailant can be gathered only from the nature of the joint assault and where therefore each assailant will ordinarily be presumed to intend the same consequence from the joint act.

I do not regard this case as an authority inconsistent with the view I have expressed.

In 41 C. W. N. 570⁸ the learned Judges expressed the opinion that cases in which S. 34 is combined with S. 304 (1) may be theoretically possible but must be rare, and the reason given is that in such a case it is necessary to establish not merely that all the participants in the joint act intended to cause death, but that they all intended to cause death in circumstances coming within one or other of the exceptions mentioned in S. 300, Penal Code, e.g., that they all intended to exceed the right of private defence. It seems to me that S. 38 provides a complete answer to this line of reasoning. If all intend to cause death, then one may be within one of the exceptions and be liable under S. 304 (1) and the other may be guilty under S. 302.

In 41 C. W. N. 575⁹ Henderson J. observed, "whereas S. 34 deals with intention part 2 of S. 304 deals with knowledge. The result is that in order to establish this particular charge there has to be a peculiar combination of knowledge and intention which would hardly arise in real life. I do not say that the jury cannot possibly convict on such a charge . . ."

3. ('27) 14 A.I.R. 1927 Cal. 324 . 31 C. W. N. 314 : 45 C.L.J. 131, *Adam Ali v. Emperor*.

4. ('09) 36 Cal. 302, *Emperor v. Morgan*.

5. (1880) 6 Q. B. D. 79.

6. ('09) 36 Cal. 659, *Gouridas v. Emperor*.

7. ('21) 8 A. I. R. 1921 Cal. 241 : 25 C. W. N. 24, *Foezullah v. Emperor*.

8. ('37) 41 C. W. N. 570, *Debi Charan v. Emperor*.

9. ('37) 41 C.W.N. 575, *Nanda Mallik v. Emperor*.

The learned Judges in this case apparently abandoned the reasoning of Walmsley J. in A.I.R. 1925 Cal. 913,¹ in that they seem to have conceded that S. 34 can in rare cases be combined with S. 304 (2) whereas according to the reasoning (which I have attributed to Walmsley J.) a verdict of guilty under S. 304 (2) read with S. 34 is a contradiction in terms. The learned Judges do not indicate how S. 304 (2) can be combined with S. 34, and consequently do not indicate what the difficulty is, nor how it can be overcome.

But later in the same judgment, Henderson J. seems to adopt the reasoning of Walmsley J. for he observes :

"It was suggested by the learned Deputy Legal Remembrancer that one might alter the conviction into one under S. 325. Now, here again, that is a section to which it is not easy to apply S. 34. Grievous hurt is a pure creation of the statute, and it cannot be easy to say that it was the common intention to cause one particular form of hurt rather than other."

The learned Judges did not decide the case on this ground and these remarks must be regarded as obiter dicta. The average man does not think in terms of the Penal Code. If he sets out to commit an offence 'affecting the human body' he necessarily intends to do a criminal act. In exceptional cases, he may intend to murder his victim. In such cases he must intend to cause death. But, except in cases where he intends to cause the death of his victim, he does not contemplate in his own mind that he will 'commit culpable homicide,' or 'voluntarily cause grievous hurt with a dangerous weapon.' All he contemplates is that he will give his intended victim 'a good beating' or 'a sound thrashing' etc. I am unable to believe that in the ordinary case punishable under S. 325, Penal Code, the offender actually thinks of breaking his victim's bones ; and it is quite unthinkable that any man assaults another with the intention of inflicting a hurt which will 'cause the sufferer to be during the space of 20 days, in severe bodily pain or unable to follow his ordinary pursuits'. Yet no Court has found any difficulty in convicting an offender under S. 325, Penal Code. The truth is that the Court satisfies itself that the offender intended the assault, and that the assault was of such a nature that the offender must have known that grievous hurt was likely to be caused. Similarly, in cases under S. 304, part 2 the Court finds that the offender intended the assault, and from the nature of the assault the Court infers that the offender must have known that death was likely to result from the act.

If the same attitude is adopted to offences committed by a number of persons, the Court will first determine whether all the persons intended the 'severe thrashing' or 'good beating', etc. If so the Court will then hold each person liable for that thrashing as if he had done it alone, and will consider separately in the case of each participant, whether he must have known what the result of the act was likely to be. Moreover the Court is bound to recognise that when a number of persons join together to assault another, each of them must realise that he cannot control his companions and measure the force of his companion's blows and each of them must necessarily be taken to intend an assault of such severity as the numbers of the assailants and the nature of their weapons portend. There can be no question of the Court speculating whether A intended exactly the blow struck by B if

the blow struck by B was the kind of blow which any reasonable man would expect to be struck in an assault of that particular type.

This seems to me justified by the provisions of Ss. 34 and 35, Penal Code, and I can see no reason why in offences committed by a number of persons the Court should adopt a standard which it refuses to adopt in offences committed by a single individual.

With great respect to the learned Judges who decided 41 C. W. N. 570³ and 41 C. W. N. 575,⁹ I can find no difficulty whatever in applying S. 34 to offences punishable under S. 304 (1), 304 (2) or S. 325, Penal Code; and if the interpretation of S. 34 which I have adopted is correct, there can be no difficulty, e.g., what would be the offence if three or four men fire a volley at their attackers and thereby cause death where the circumstances are such that the right of private defence exists but does not extend as far as voluntarily causing death? What would be the offence if two young men overhear their mother so insulted that they are deprived of the power of self-control and intentionally cause the death of the insulter?

What would be the offence if a man above the age of 18 consents to taking the risk of death, and is killed by the joint action of two others?

Surely in all these cases the offence is culpable homicide punishable under S. 304 (1) read with section 34.

If it is once conceded that S. 34, Penal Code, does not require that all the participants in the joint act must have the common intention of committing the same offence or must have the common intention of producing the same result by their joint act, all the difficulties disappear. I have given my reasons above for holding that such a limited interpretation cannot be put upon the words of the section.

In the result therefore I hold that there is no difficulty in applying Ss. 34 and 35 to cases of culpable homicide punishable under S. 304 (2) and that there is no reason for holding that there is any error in the verdict of the jury owing to misdirection on this point.

After careful consideration of the entire evidence and the arguments put before us I see no reason to interfere with the convictions or with the sentences. In my opinion the appeal should be dismissed.

DAS J.—As I have arrived at a different conclusion on the points argued before us I consider it necessary to state my reasons in detail. It is needless for me to state that I do so with a certain amount of diffidence, for my conclusions and the reasons therefor have not the approval or concurrence of my learned brother for whose vast knowledge and experience in these matters I entertain the highest respect.

The facts of this appeal have been already stated by my learned brother and I shall not repeat them. I shall at once take up the points urged by Mr. Sudhansu Mukerjee as *amicus curiæ* and deal with them one by one.

(i) We were referred to the following passage in the charge to the jury :

"Exhibit 2 F. I. R. This was recorded at 4-30 P.M. at the thana. The first information report should be used not as substantive evidence, but for other subsidiary purposes like corroboration of prosecution evidence, etc. Its value depends on the promptness with which it was recorded."

Mr. Sudhansu Mukherjee complained that in this passage the learned Judge only emphasised

the value of the first information report as corroboration of the present evidence of the prosecution witnesses and then, having so emphasised its value as corroborative evidence, the learned Judge referred to it no less than 11 times as supporting the prosecution case. The learned Judge only once referred to the first information report for the purpose of showing that a certain statement of prosecution witnesses was not noted in it. The learned Judge did not bring it to the notice of the jury, generally or even in connexion with the last mentioned omission, that the first information report could also be used for the purpose of contradicting and falsifying the prosecution story. I agree with Mr. Sudhanshu Mukherjee that the learned Judge should have also expressly and specifically mentioned that aspect of the matter to the jury. In 45 C. W. N. 763¹⁰ Bartley J. pointed out that such an omission in the charge was a grave error of law. The above observation was made in respect of the charge of this learned Sessions Judge in that case and it is surprising that he should make the same mistake again. Of course this time the learned Sessions Judge added the word "etc." after the word "corroboration" and I do not know whether the learned Judge in addressing the jury in Bengali adverted to that aspect. While I am of opinion that, having regard to the clear ruling of Bartley J., the learned Sessions Judge should not have left the matter in doubt, I should hesitate to say that this omission, by itself, would, in the circumstances of this case, be sufficient to vitiate the verdict.

(ii) Mr. Sudhanshu Mukherjee's next attack was against the manner in which a General Diary entry dated 24th June 1942 (Ex. 5A) was explained to the jury. While collecting and enumerating the documentary evidence in the case the learned Judge observed as follows :

"Exhibit 5 (a) another General Diary entry, dated 24th June 1942. This has been admitted to show that the accused had hostility with the complainant. This is an entry at the instance of the accused party making certain allegations against Mafiz and his brothers."

Then while discussing the question whether the accused persons shared the intention of committing culpable homicide the learned Judge charged as follows :

"The accused are inter-related, Ibra, Ahad and Rayis being brothers and Jasi being a son of Ahad. We may also refer to the previous hostility. There is Ext. 5 (a) General Diary entry to show this. If there was hostility between the parties, then there is likelihood of there being a common intention."

Mr. Sudhanshu Mukherjee complained that the learned Judge overlooked the fact that the General Diary entry Ex. 5A was recorded at the instance of Rayis Akanda alone and did not pointedly or at all bring that fact to the notice of the jury and the result was that the statement of a co-accused was used against the other accused. I am not of opinion that this complaint is without any substance. The learned Sessions Judge not only referred to the fact of a diary having been entered but also in a way referred to the contents thereof. The statement of an accused may be taken into consideration as against his co-accused only if the statement be in the nature of a confession as provided in S. 30, Evidence Act. I know of no other provision of law which would permit such use of a statement of an ac-

cused against his co-accused. In 44 C.W.N. 398¹¹ a Bench of this Court deprecated the use of a statement of one accused in his examination under S. 342, Criminal P. C., as evidence against his co-accused. The same principle should also apply to this case. Further, the alleged old enmity was an important part of the prosecution case and from that point of view Ex. 5A was certainly an important piece of evidence if it could be regarded as recording or reflecting the mental attitude of all the accused. It was used for such purpose and it is impossible to say that such use of this document has not influenced the minds of the Jury. It is true that the accused persons are related to one another and it may well be that in getting that General Diary entry recorded Rayis acted for the family but it may also be an act of his own with which the other accused had nothing to do. It does not necessarily follow, from the mere fact of the accused being closely related, that everything said or done by one must have been on behalf or in the interest of all of them. It was, in my opinion, clearly incumbent on the learned Sessions Judge to have specifically and explicitly drawn the attention of the jury to the fact that this General Diary Entry, Ex. 5A, was on the face of it recorded at the instance of Rayis and then to have left it to them to conclude whether or not it was done on behalf of all of them and to have warned them that if they found that it was done by Rayis on his own behalf it would not be any evidence against the others. In my judgment there has been a material misdirection in relation to Ex. 5A.

(iii) Mr. Sudhanshu Mukherjee's third objection was with reference to the Map and the index being Ex. 4. This Map and index were prepared and signed by Sub-Inspector, G. Waheb who was the investigating officer in this case and both of them have been exhibited. In the Map certain huts are marked with the letter "A". In the Index it is explained that—"A" is the house of Manikulla Munshi, 7 rashis west from place of occurrence and where witnesses assembled for certain enquiry." The fact stated in this explanation was certainly derived from statements made to the Sub-Inspector as investigating officer and as such was clearly inadmissible in evidence as hearsay and also particularly having regard to the provisions of S. 162, Criminal P. C. I think Mr. Sudhanshu Mukherjee was right in this contention and is clearly supported by the decision in 30 C.W.N. 142.¹² The identification of the accused persons depended, apart from the dying declaration of the deceased, on the evidence of certain prosecution witnesses who were alleged to have assembled in the house of Manikullah Munshi. The defence case, as it appears from the cross-examination of the prosecution witnesses and particularly of P. Ws. 4, 5 and 6, was that those witnesses were nowhere near the house of Manikulla Munshi at the time of occurrence. Therefore, the question whether they had assembled at Manikulla Munshi's house at the time was a very important one and it may well be that the statement involved in the explanation in the index to the map was taken by the jury as a contemporaneous statement of the witnesses and as such establishing the truth of their evidence in Court. In my opinion, there has been

11. ('40) 27 A.I.R. 1940 Cal. 328 : 44 C.W.N. 398, Dargahi Miah v. Emperor.

12. ('26) 13 A.I.R. 1926 Cal. 550 : 30 C.W.N. 142, Bhagirathi v. Emperor.

10. ('41) 28 A.I.R. 1941 Cal. 533 : 45 C.W.N. 763, Abdul Latiff v. Emperor.

a clear violation of the provisions of S. 162, Criminal P. C.

(iv) Mr. Sudhanshu Mukherjee's last objection to the charge to the jury was that the learned Judge did not administer any caution to the jury in relation to Ex. 1, being the entry in the diary of the constable, who is alleged to have been in the house of Manikulla Munshi and to have come to the place of occurrence with the other persons assembled there and taken down the statement of Mafizuddin the deceased. The learned advocate admitted that this piece of evidence was not hit by S. 162, Criminal P. C., but maintained that as a matter of ordinary prudence the learned Judge should have warned the jury that they should not attach such importance to this exhibit as they would attach to the sworn testimony of a witness who had been subjected to cross-examination or to a regular dying declaration recorded by a Magistrate after observing the formalities of the law. I do not think there is much substance in this contention. I rather agree with Mr. Debabrata Mukherjee, the learned Assistant Deputy Legal Remembrancer, that the mere omission to give a caution to the jury in relation to this Ex. 1 did not amount to any serious misdirection or at any rate to such misdirection as would vitiate the verdict of the jury.

(v) Finally Mr. Sudhanshu Mukherjee raised a point as regards the charge as framed, which is of considerable general importance, namely, whether it is proper and permissible under the law to frame a charge under S. 304 read with S. 34, Penal Code, and to put several persons on trial on such a charge or convict them under S. 304, part 2 read with S. 34 or in other words, whether culpable homicide not amounting to murder can be imputed to several persons by invoking and applying the provisions of S. 34, Penal Code, which postulates the criminal act as having been done in furtherance of the common intention of all the participators in the crime.

At the time of the admission of this appeal there was a clear difference of opinion between Blank J. and Pal J. Blank J. was apparently of opinion that such a charge and conviction were permissible under the law and the appeal should be summarily rejected, while Pal J. was of opinion that the appeal should be admitted so that this point of law might be cleared up. The appeal was accordingly admitted. There can be no doubt of the importance of the point of law involved in this appeal. There is a marked divergence of judicial opinion in the matter which is also exemplified by the fact that this very appeal was admitted on a difference of opinion and is ending in another to-day. Perhaps at a future date the fundamental difference of opinion will be set at rest by an authoritative decision of a Full Bench of this Court.

The same point of law was also raised by Mr. Sudhanshu Mukherjee in appeal No. 104 of 1943 (*Pathia Kaibarta and others v. The Emperor*) and by Mr. S. C. Talukdar in Appeal No. 98 of 1943 (*Moslim and others v. The Emperor*). Mr. Debabrata Mukherjee appeared for the Crown in all the three appeals which have been heard one after another. The points of law involved in all the three appeals have been argued at the bar at some length and, I may add, with admirable ability and learning. Speaking for myself, I am, indeed, indebted to all the learned advocates for their very lucid exposition of the law and I now proceed to state the conclusions I have come to and my reasons for doing so.

The accused persons in all these cases were charged under S. 304 read with S. 34, Penal Code. It is necessary, therefore, to carefully examine those sections. The marginal note to S. 304, Penal Code is: "Punishment for culpable homicide not amounting to murder." It will be seen from the marginal note and the language used in the body of this section that this section only purports to prescribe punishment for culpable homicide not amounting to murder. It will be further observed that different punishments are prescribed for the offence of culpable homicide not amounting to murder according to the different state of mind of the offender with which the act by which the death is caused is done. Thus if the act by which the death is caused is done with the intention of causing death or of causing such bodily injury as is likely to cause death the offender shall be punished with transportation for life or imprisonment of either description for a term which may extend to ten years and shall also be liable to fine, but if the act by which the death is caused is done with the knowledge that it is likely to cause death but without any intention to cause death or to cause such bodily injury as is likely to cause death he shall be punished with imprisonment of either description for a term which may extend to ten years or with fine or with both. In short the degree of punishment is made commensurate with the degree of culpability evidenced by the state of mind of the offender with which the act by which the death is caused is done. This section, however, does not fully indicate what is culpable homicide not amounting to murder. It is true it refers to the act by which death is caused and the intention or knowledge with which the act is done but that is not conclusive, for, as will be presently seen, the very act done with the very intention or knowledge mentioned in this section may equally be murder or culpable homicide not amounting to murder according to different circumstances in which the act is done. In other words this section does not define culpable homicide not amounting to murder but it is what, by its marginal note and the language employed in its body, it purports to be, namely, a section prescribing punishment for culpable homicide not amounting to murder; see the observations of Straight J. in 3 All. 776¹³ at p. 778. In order, therefore, to ascertain what is culpable homicide not amounting to murder one has to look at other sections of the Penal Code.

Chapter 16, Penal Code, deals with offences affecting the human body. The group of sections from 299 to 311 deals with offences affecting life. Section 299 defines the offence of culpable homicide. The illustrations and explanations that follow only clarify the meaning of the section. It will be observed that to constitute the offence of culpable homicide as defined in S. 299 the death must be caused by doing an act:

- (a) With the intention of causing death, or
- (b) With the intention of causing such bodily injury as is likely to cause death, or
- (c) With the knowledge that the doer is likely by such act to cause death.

These are the three requisites of the act constituting culpable homicide.

Then comes S. 300 which deals with murder. This section provides that except in the cases thereafter excepted culpable homicide is murder if the act by which death is caused is done

13. ('81) 3 All. 776, *Empress of India v. Idu Beg.*

with certain intention or knowledge in relation to that act. Leaving aside for the moment the exceptions referred to in the opening words of the section and which are set out at the end thereof, it will be observed that under this section culpable homicide is murder if the act by which the death is caused is done

- (1) with the intention of causing death, or
- (2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or
- (3) with the intention of causing such bodily injury as is sufficient in the ordinary course of nature to cause death, or
- (4) with the knowledge that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death and without any excuse for incurring the risk of causing death or such injury as aforesaid.

These are the four requisites of the act constituting murder.

Having ascertained what is murder within the meaning of the earlier part of S. 300 I now proceed to consider the exceptions which are set out in the latter part of the section. The exceptions are five in number. The very first thing I notice in these exceptions is that each of them refers pointedly to certain occasions or circumstances in which the death is caused. The act by which the death is caused may be done with the intention or knowledge enumerated in cls. 1, 2, 3 and 4 of the earlier part of the section yet each of the exceptions provides that the resulting culpable homicide will not be murder if that act with that intention or knowledge is done in the circumstances and subject to the conditions specified in the five exceptions. When I examine these exceptions more closely I find that each of them is based on certain intelligible principles. Thus irresistible impulse born of passion generated by grave and sudden provocation or in a sudden fight and finding expression in a spontaneous act causing death is acknowledged as an extenuating circumstance in exceptions (1) and (4). The natural and legitimate propensity for the preservation of one's person and property and the public policy of protecting and encouraging the sense of duty of public officers for the advancement of public justice are recognised in exceptions (2) and (3), respectively. The consent of the victim forms the foundation of exception (5). Broadly speaking, in the cases falling within any of the exceptions, what saves the causing of the death from being a murder is primarily the circumstance which precedes and, as it were, prompts the doing of the act by which the death is caused. In short it is the extenuating circumstance which reduces murder to culpable homicide not amounting to murder.

Then when I examine the extenuating circumstances recognised in the exceptions I notice that in each case the extenuating circumstance is extraneous to the person who causes the death, in the sense that it does not depend on his volition. The grave and sudden provocation in exception (1) has to come from the victim. The violation of the sanctity of one's person or the invasion of one's property must first proceed from the victim so as to bring the act of killing in defence of one's person or property within exception (2). The act or conduct of the offender against public justice must precede the act of the public officer in discharge of his duty as

contemplated by exception (3). It requires two parties to give rise to a sudden fight referred to in exception (4). Lastly, the consent mentioned in exception (5) must first come from the victim. If the provocation or the invasion of person or property or the conduct of the offender against public justice or the sudden fight or the consent of the victim is sought or provoked or procured by the person doing the act by which the death is caused, then the act causing death done in circumstances so produced by the offender himself will not be protected by the exceptions at all.

The last thing I gather from the language of exceptions 1, 2, 3 and 4 is that when the extenuating circumstance arises, independently of the person who does the act which causes the death that person, to be within the exceptions must do the act spontaneously and without premeditation. Spontaneity and absence of premeditation are the essential ingredients in these exceptions. If the link of spontaneity between the extenuating circumstance and the act causing the death is broken by the intervention of meditation or deliberation then the person who does the act which causes the death is not protected, because the act cannot then be referable directly to the extenuating circumstance. The position is clearly and plainly obvious as regards exceptions 1 and 4. As regards exceptions 2 and 3 it may be said that one may, in anticipation, make up one's mind to use force to defend his person or property or a public officer may make up his mind beforehand to use force to apprehend the offender against public justice or to prevent him from offending against public justice. I can well conceive such a case. But by making up one's mind to use force if necessary one commits no crime. Nor does one commit any crime by using force which is necessary, in the one case to defend one's person or property (*see* Ss. 96 to 106) and in the other case to prevent an offence against public justice. Even if on the spur of the moment in either of the two cases force is used spontaneously but in excess of what is necessary and death is caused, yet the culpable homicide will not be murder. But if one makes up one's mind, whether before or after the extenuating circumstance arises, to use force in excess of what will be necessary and uses excessive force pursuant to such preconceived intention and death is caused thereby, then his act is premeditated and evinces ill will and the person who does the act which causes the death in such circumstances must be outside the pale of protection of exceptions 2 and 3 alike.

Such, I conceive, are the underlying principles of the exceptions. To summarise, therefore, we find that under S. 300 culpable homicide is murder if the act by which the death is caused is done with the intention or knowledge specified in cls. (1), (2), (3) and (4) of the earlier part of the section. Then we find that culpable homicide is not murder if the same act by which death is caused is done in certain extenuating circumstances and subject to certain conditions specified in the five exceptions set out in the latter part of the same section.

The question then arises: do these exceptions exhaust the list of culpable homicide not amounting to murder, or are there other cases of culpable homicide not amounting to murder? For an answer to this question we have to look into the sections more minutely and ascertain whether, apart from the exceptions, there can be any culpable homicide which does not amount to

murder. I do not propose to embark upon a lengthy discussion on this point and I shall content myself with only referring to the decision of Sir Barnes Peacock C. J. in 5 W. R. Cr. 45¹⁴ and to the very lucid observations of Melvill J. in 1 Bom. 342¹⁵ which has been followed in 7 Luck. 634.¹⁶ If, in the light of the above-mentioned decisions, we compare the three requisites of the act constituting culpable homicide under S. 299 which I have marked as (a), (b), and (c) with the four requisites of the act constituting murder under S. 300 which I have marked as (1), (2), (3) and (4) it will be found that Ss. 299 and 300 are not co-extensive and that S. 299 is somewhat wider than S. 300. In other words, S. 299 is the genus and S. 300 is the species in an aggravated form. Both (a) of S. 299 and (1) of S. 300 predicate an intention to cause death and are co-extensive and therefore culpable homicide committed by an act done with the intention to cause death will always be murder unless it comes within any of the exceptions of S. 300. Item (b) of S. 299 and items (2) and (3) of S. 300 alike predicate an intention to cause bodily injury, the intention in the first case being to cause such bodily injury as is likely to cause death and in the second case the intention being to cause such bodily injury as the offender knows is likely to cause the death of the particular victim or is sufficient in the ordinary course of nature to cause death. It has been said that the difference is fine but appreciable, that it is a question of degree of probability and in ultimate analysis resolves itself into a consideration of the weapon used. Thus a blow from a stick on a vital part may be likely to cause death and a wound from a sword in a vital part is sufficient in the ordinary course of nature to cause death. In other words, (b) of S. 299 is wider than (2) and (3) of S. 300. Neither (c) of S. 299 nor (4) of S. 300 connotes any intention at all and both of them are based on the knowledge of the dangerous character and the likely or probable consequence of the act. Whether the offence committed by an act done with such knowledge is murder or is culpable homicide not amounting to murder, depends upon the refined distinction between the one kind of knowledge and the other, to be drawn from the degree of risk to human life. If death is likely result, it is murder. Indeed as Sir Barnes Peacock C. J., pointed out in 5 W. R. Cr. 45.¹⁴

"There are many cases falling within the words of S. 299 'or with the knowledge that he is likely by such act to cause death' that do not fall within cls. 2, 3 or 4 of S. 300, such for instance, as the offences described in Ss. 279, 280, 281, 282, 284, 285, 286, 287, 288 and 289, if the offender knows that his act or illegal omission is likely to cause death, and if in fact it does cause death. But although he may know that the act or illegal omission is so dangerous that it is likely to cause death, it is not murder, even if death is caused thereby unless the offender knows that it must in all probability cause death, or such bodily injury as is likely to cause death, or unless he intends thereby to cause death or such bodily injury as is described in cl. 2 or cl. 3 of Section 300."

Furious driving and firing at a mark near the public road done with knowledge of the dangerous character and the likely effect of the act and re-

sulting in death are cited as examples of culpable homicide not amounting to murder by Melvill J. It must be remembered that in some palpable cases you may infer intention from knowledge. Those cases logically should fall within 1, 2 or 3 of S. 300. Both (c) of S. 299 and (4) of S. 300 deal with cases where intention does not come in. These cases are only concerned with the knowledge of the kind specified therein.

The result we arrive at, therefore, is that culpable homicides not amounting to murder may be classified into three groups :

Group (1): The cases which fall within any of the five exceptions in S. 300.

Group (2): The cases which fall within (b) of S. 299 but not within (2) or (3) of S. 300 by reason of the lesser degree of probability or risk to human life due mainly to the nature of the weapon used; and

Group (3): The cases which fall within (c) of S. 299 but not within (4) of S. 300 by reason of the lesser degree of risk to human life and which are illustrated by rash or negligent act done with knowledge of the likelihood of its dangerous consequences, e. g., furious driving or firing at a mark near the public road and the like.

If we now pass on to S. 304 we shall find that, broadly speaking, culpable homicides not amounting to murder which come within groups (1) and (2) mentioned above are punishable under the first part of S. 304 and those which come under group (3) are punishable under the second part of S. 304. The punishment under the first part of S. 304 is heavier than that under the second part because in the cases within groups (1) and (2) the act by which death is caused is done with certain specified intentions and is therefore more culpable than the act which constitutes culpable homicide not amounting to murder which comes under group (3) and in which intention has no place and plays no part.

Having thus ascertained the different kinds of culpable homicides not amounting to murders and the appropriate punishment thereof our next task is to see whether S. 34 can be properly invoked so as to make several persons constructively liable for such an offence.

First of all let us ascertain the true meaning and effect of S. 34. It is by no means easy to construe this S. 34. Formerly, there were two views about this section. One view which was called the wider view construed the words "a criminal act" as including a series of acts done by several persons resulting in an offence. The other view called the narrower view limited those words to a single act done by several persons jointly. The matter has been elaborately discussed in the Full Bench case (popularly known as the Sankaritola Post Office murder case) reported in 28 C. W. N. 170=38 C. L. J. 411.² The case went up to the Judicial Committee and the judgment of the Judicial Committee will be found reported in 52 I. A. 40=52 Cal. 197=29 C. W. N. 181.¹⁷ The Full Bench and the Judicial Committee dissented from the narrower view expressed by Stephen J. in 41 Cal. 1072¹⁸ and adopted the wider view. It was held by the Judicial Committee that the words "a criminal act" mean that unity of criminal behaviour which results in a criminal offence. That case was

14. ('66) 5 W. R. Cr. 45: Beng. L. R. Sup Vol. 443 (FB), Queen v. Gorachand Gope.

15. ('75-77) 1 Bom. 342, Reg. v. Govinda.

16. ('32) 19 A. I. R. 1932 Oudh 186 : 7 Luck. 634, Emperor v. Ratan.

17. ('25) 12 A.I.R. 1925 P. C. 1 : 52 Cal. 197 : 52 I. A. 40 : 29 C. W. N. 181, Barendra Kumar v. Emperor.

18. ('14) 1 A.I.R. 1914 Cal. 901 : 41 Cal. 1072 Emperor v. Nirmal Kanto.

concerned with a charge under S. 302 read with S. 34, Penal Code, and the point directly in issue in that case was as to the meaning and import of the words "a criminal act." The point we are now discussing, namely, the propriety or legality of a charge under S. 304 read with S. 34, in view of the requirement of common intention referred to in the latter section, was not directly in point in that case. There are, however, observations both in the judgments of the learned Judges constituting the Full Bench and in the judgment of the Judicial Committee which, I conceive, clearly indicate that the expression "common intention" in S. 34, Penal Code, means intention shared by all the participators to produce all that is meant and implied by the expression "a criminal act" in the earlier part of the section, that is to say, the crime that is actually committed. Reference may be made to the 3 passages in the charge to the jury delivered by Page J., in that case quoted in the reports, the observations of Mookerjee J. at pp. 189-191 of 28 C.W.N. and those of Richardson J. at p. 214. The observations of Cuming J., at pp. 244-245 are helpful on the point now under consideration. Thus observed his Lordship :

"Section 34 and the connected Ss. 35, 36, 37 and 38 create no substantive offence. They are merely declaratory of a principle of law and in charging an accused person it is not necessary to cite them in the charge. If therefore the view of the law given by the learned Judge to the jury fall within any one of these sections it will be sufficient. Taking first of all S. 34 I am not prepared to accept the extremely restricted view which has been urged by the learned counsel. The expression "criminal act" includes also a series of acts.

A criminal act may well consist of parts each of which is more or less *necessary to the accomplishment of the act*. Thus one man may keep guard at the door, while another man holds the victim and a third man kills him. Or one man may be there in order by his presence to encourage, support or protect the man who is actually killing the victim. They would to my mind be all of them doing some parts of *the act* because it may well be that without their support *the act* could not be done. They must therefore be considered to be *all doing the act* though each is executing a different part of *the act*.

Further, if the expression "act" includes a series of acts then all the different acts of the conspirators, such as keeping guard, terrorising the onlookers or victim must be considered as *one act*. It is impossible to conceive two individuals doing the identically same act. Such a thing is impossible. Therefore to have any meaning the expression "*criminal act done by several persons*" must contemplate an act which can be divided into parts each part being executed by different persons, the whole making up the criminal act which was the common intention of all. To put it in another way the one criminal act may be regarded as made up of a number of acts done by the individual conspirators, the result of their individual acts being the criminal act which was the common intention of them all.

I think that the expression "criminal act done by several persons" includes the case of a number of persons acting together for a common object and each doing some act in furtherance of the final result, which various acts make up the final act."

I now pass on to the judgment of the Judicial Committee delivered by Lord Sumner and reported in 52 I. A. 40.¹⁷ At pp. 51-52 his Lordship stated as follows :

"As soon, however, as the other sections of this part of the Code are looked at, it becomes plain that the words of S. 34 are not to be eviscerated by reading them in this exceedingly limited sense. By S. 33 a criminal act in S. 34 includes a series of acts, and, further "act" includes omission to act, for example, an omission to interfere in order to prevent a murder being done before one's very eyes. By S. 37, when any offence is committed by means of several acts; whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other persons, commits that offence. Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes, as in other things, "they also serve who only stand and wait." *Section 34 deals with the doing of separate acts similar or diverse by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for "that act" and "the act" in the latter part of the section must include the whole action covered by "a criminal act" in the first part because they refer to it.* Section 37 provides that, when several acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to co-operate in the offence (which may not be the same as an intention common to all), makes the actor liable to be punished for the commission of the offence. Section 38 provides for different punishments for different offences as an alternative to one punishment for one offence, whether the persons engaged or concerned in the commission of a criminal act are set in motion by the one intention or by the other."

Then his Lordship compared S. 34 and S. 149 and showed that there was no conflict between them and at p. 52 explained that there was a difference between "intention" and "object." His Lordship finally summed up his interpretation of S. 34 at p. 56 in the following words :

"In other words, "*a criminal act*" means that unity of criminal behaviour, which results in something, for which an individual would be punishable, if it were all done by himself alone, that is, in a criminal offence."

On my reading of the charge delivered by Page J. and the judgments of the learned Judges constituting the Full Bench and the judgment of Judicial Committee delivered by Lord Sumner and particularly the passages I have underlined (here italicised) I deduce the following propositions :

(a) That S. 34 does not create a new offence but formulates a principle of liability.

(b) That the expression "a criminal act" in the beginning of the section does not mean a single act done by several persons, for logically several persons cannot do the same act as one of them does.

(c) That S. 34 deals with the doing of separate acts, similar or diverse, by several persons which several acts result in a particular offence and treats the several acts and the effect produced thereby as one whole action and calls it "a criminal act."

(d) The words "a criminal act" in the earlier part of the section mean that unity of criminal behaviour which results in a criminal offence.

(e) That the words "that act" and "it" in the latter part of the section include the whole action covered by the expression "a criminal act".

(f) That to come within S. 34, the "criminal act" so understood must be done by several persons in furtherance of their common intention to do that very "criminal act" which is made up of each and all the separate acts, that is to say,

their common intention must be to commit the very offence which is ultimately and actually committed.

The conclusion I have arrived at as to the meaning and import of the expression "common intention" in S. 34 also finds support from subsequent judicial decisions. Thus in 35 C. W. N. 463,¹⁹ where four persons were convicted of grievous hurt with the aid of S. 34, Rankin C. J. observed at p. 464 as follows:

"If there had been five of these people and they had come to assert a right by show of force so as to bring into operation such a section as S. 149, then no doubt if any one of them hit the woman over the head with a lathi in pursuance of the common object, the whole of the party might have been found guilty constructively by virtue of S. 149 read with S. 325, Penal Code. But this is not that case. There were only four people present. We are concerned not with S. 149 but with S. 34. *Section 34 is not applicable except in a case where there is participation in action to commit a crime with a common intention.* If, for example, one of these people had prevented Jatoo from running away and another had held him down and a third had struck him over the head with a lathi, they could all rightly be convicted under S. 325 read with S. 34. The element in S. 149 of being a member of the unlawful assembly has a counterpart in S. 34, viz., *participation in action to produce grievous hurt.* But it is quite wrong to say that because they had a common intention to assert a right to the bamboo clump therefore without showing which of these people took any part in beating either Jatoo or his wife, they can all be convicted because one of them — we do not know who — committed a grievous hurt. *There must be participation in action with a common intention to produce grievous hurt,* although the different accused might have taken different parts."

I have underlined (here italicized) the passages which, to my mind, indicate the true meaning and scope of the expression "common intention" in S. 34, Penal Code.

The same conclusion was reached by a Full Bench of the Rangoon High Court in 8 Rang. 603.²⁰ I content myself with setting out the headnote and underlining (here italicized) the portion I consider important for our present purpose:

"The common intention referred to in S. 34, Penal Code, is an intention to commit the crime actually committed and each accused person can be convicted of that crime only if he has participated in that common intention."

The intention of an accused person must be judged from the proved facts of the particular case itself, and no general rule applicable to cases of this class can be drawn as to what presumption may be drawn on any given state of facts."

On the authorities I have referred to and on broad general principles of constructive liability therefore the meaning and import of S. 34 appear to me to be as follows:

(a) Several persons must have the common intention to commit a particular offence. What the common intention precisely is in a particular case is a question of fact. In a very large majority of cases it will be difficult to get any direct or positive evidence. It will have to be inferred from evidence of previous association of the offenders, the preparation, the nature of the arms or weapons used, the nature and intensity of the

acts done, the result produced thereby and all other surrounding circumstances.

(b) All the several persons must participate, i. e., do some act in furtherance of that common intention. It does not matter whether one does an important act and another does a minor act. What is necessary is the actual participation. In this connexion should be remembered the provisions of Ss. 32 and 33, Penal Code, and the quotation in the judgment of Lord Sumner: "They also serve who only stand and wait."

(c) The several acts done by several persons must result in the commission of the offence which it was their common intention to commit.

(d) When the first three conditions are fulfilled each of the several persons is liable for the whole series of acts done by all of them and the effect produced thereby, i. e., for the complete offence.

Thus interpreted and understood there will be no conflict between S. 34 and Ss. 35, 37 and 38. Each of these sections formulated a principle and the liability of several persons engaged or concerned in act or acts resulting in an offence or offences has to be determined according to one or other of these principles. Thus if you find that several persons are doing separate acts, similar or diverse, in furtherance of a common intention to produce the crime that is ultimately committed, S. 34 will come into operation and make each of them liable for the whole series of acts and the resulting offence. If you find that several persons are engaged in doing what is not per se criminal but is criminal only if it is done with a criminal knowledge or intention then under S. 35 each of those persons who joins in the act with such knowledge or intention will be liable for that act as if done by him alone with that knowledge or intention and those who joined in the act but had not such knowledge or intention will not be liable at all. You may find that several persons are co-operating in the commission of an offence by doing separate acts at different times or places, which acts by reason of intervening intervals of time may not be regarded as one act or which may not necessarily be the outcome of a common intention. Such a case will fall within S. 37 as explained by Lord Sumner in 52 I.A. 40¹⁷ at p. 51. Again you may find several persons engaged or concerned in a criminal act, having been set in motion by different intentions they may under S. 38 be liable for different offences as explained by Lord Sumner. I see no reason to think that S. 34 was intended to cover all conceivable cases where several persons may be concerned or engaged in committing act or acts which result in an offence or offences.

Such being my view of the meaning of S. 34, I have now to see whether culpable homicide not amounting to murder can be constructively imputed to several persons so as to make them punishable under S. 304 read with S. 34 at all and, if yea, to what extent the two sections may be read together.

I have already enumerated what are culpable homicides not amounting to murder and classified them into three groups. Let me now take group (1) which comprises those cases which fall within any of the five exceptions specified in S. 300. I have already analysed and explained what I conceive are the underlying principles of these exceptions. If I am correct in that analysis of excepts. 1, 2, 3 and 4, it is impossible to hold that any person can be logically said to have conceived or formed the intention of committing culpable homicide not amounting to murder

19. (31) 18 A.I.R. 1931 Cal. 643 : 35 C.W.N. 463, Fazoo Khan v. Jatoo Khan.

20. (31) 18 A. I. R. 1931 Rang. 1 : 8 Rang. 603 (F.B.), Nga E v. Emperor.

which will fall within any of the excepts. 1, 2, 3 and 4. The very premeditation will take the case out of those exceptions and the causing of death with such premeditated intention will be nothing but murder. If this is so with reference to a single individual, the case of several persons, in anticipation, entertaining a common intention to commit culpable homicide not amounting to murder which fall within excepts. 1, 2, 3 or 4 is still more impossible to comprehend. "Common intention" referred to in S. 34 being the intention to commit the crime which is actually committed, in my opinion, there can be no room or scope for invoking the aid of S. 34 in such cases. In cases falling under exception 5, however, S. 34 may conceivably be applied.

It is suggested that the common intention may be formed after the extenuating circumstance arises. Thus, where three brothers see their mother to be assaulted or outraged by an assailant and all three of them, under the same grave and sudden provocation, spontaneously give three blows to the assailant, each of the brothers equally intending to cause his death or to cause such bodily injury as each of them knows to be likely to cause his death or as is sufficient in the ordinary course of nature to cause death and the assailant is killed and it is not known which of the blows killed the assailant, or it is known that one hit at the leg, the other on the arm and the third on the head, it is said that each of the three brothers who had the same intention will be guilty, not of murder because of exception 1, but of culpable homicide not amounting to murder by virtue of the provisions of S. 34, Penal Code, although it is not known which blow caused the death or even if it is known that his own act did not cause the death. This argument seems to me to confound "common intention" with similar intention and to ignore one of the essential elements of grave and sudden provocation. Common intention connotes, to my mind, an intention shared by several people by express agreement or tacit or implied understanding. In the illustration mentioned above each of the brothers has a similar intention but not a common intention such as I conceive is required by S. 34. Further, in order to bring a case within the exception of grave and sudden provocation, there must be a direct link between the provocation and the resulting impulse which finds expression in the fatal blow. If that link of spontaneity is broken by the intervention of a "common intention" formed, after the provocation arises, as a result of an express agreement or tacit understanding between the three brothers after deliberation, however swift and imperceptible, then the extenuating circumstance is at an end and the fatal blow is then proximately and directly referable to the "common intention" so conceived and not to the grave and sudden provocation which preceded that common intention and will therefore be nothing but murder and each of the brothers will be liable for murder by virtue of S. 34. If therefore the case is to remain within this exception there cannot be common intention and if common intention is absent then S. 34 will not come into play at all. Similar considerations will apply to the other exceptions. I repeat that deliberation or premeditation which must in the ultimate analysis be the foundation of common intention, is inconsistent with the underlying principles of these exceptions. You cannot interpose common intention and yet retain the case within the exceptions.

In my judgment therefore it is impossible to

impute culpable homicides not amounting to murder which come within these exceptions 1, 2, 3 and 4 to several persons by applying the principles of S. 34 and make them punishable under S. 304 in so far as the latter section provides punishment for culpable homicides not amounting to murder which fall within exceptions 1, 2, 3 and 4.

Theoretically the two sections may be read together in relation to a case falling within exception 5. In modern times and for obvious reasons such cases are bound to be very rare indeed and we may leave this exception out from further consideration.

Next I take up the cases of culpable homicide not amounting to murder which I have heretofore classified under group (2). They consist of those culpable homicides which fall within (b) of S. 299 but are outside (2) and (3) of S. 300. I have shown that there is an appreciable difference between the one intention and the other. In majority of cases in practical life the act done with the intention of causing fatal bodily injury will ordinarily if death is caused, be murder and come under (2) or (3) of S. 300 but it must be recognized that there may be cases which are outside these categories yet within the category (b) of S. 299. The fine distinction cannot be ignored altogether. In these last mentioned cases the causing of bodily injury is intentional and logically may be the subject-matter of the "common intention" of two or more persons. In other words, culpable homicide not amounting to murder falling within this group (2) may be imputed to the several persons who share the common intention and participate in the commission of the crime by doing something in furtherance of such common intention. Such persons may be logically punished under the first part of S. 304 read with S. 34, Penal Code. But I again emphasise that in the vast majority of cases where several persons, armed with daos or axe or spear (or fala as in this case) set out to inflict bodily injury on their enemy to satisfy an ancient grudge or to steal paddy or fish from their neighbour's field or tank and if necessary to inflict bodily injury to the neighbour and they actually use force and inflict numerous serious and nasty bodily injuries in vital parts of the body of the victim with those weapons and cause sure death, it may not be difficult to find, from all surrounding circumstances, that the common intention of the assailants was nothing short of causing death or causing such bodily injury as was sufficient in the ordinary course of nature to cause death. In such a case to attempt to whittle down murder to culpable homicide not amounting to murder and take the case out of the category 1, 2 or 3 of S. 300 and place them within category (b) of S. 299 may be showing consideration which the criminals do not deserve. The refined distinction between the one kind of intention and the other which eminent Judges and lawyers have evolved on a comparison of the two words "likely" and "sufficient" should ordinarily be reserved for meeting the ends of justice in more meritorious cases. If, however, from all surrounding circumstances and particularly from the nature of weapon used and injuries caused it appears that the common intention was to inflict the lesser degree of bodily injury, then it is equally necessary to see that the lives of the assailants may not be put in jeopardy by bringing a charge under S. 302. In those cases a charge under S. 304 part 1 read with S. 34 will suffice.

Lastly, I proceed to consider the cases of culpable homicides not amounting to murder which I have classified under group (3). They consist of those culpable homicides which are outside (4) of S. 300 and yet within (c) of S. 299. Again comes in the refined distinction between the one kind of knowledge and the other which exists but is hard to conceive or explain. This group has been illustrated by Sir Barnes Peacock C. J. by reference to Ss. 279 to 289, Penal Code. The illustrations mentioned by Melvill J. are furious driving or firing at a mark near a public road. The offences which fall within the last mentioned sections are punished because of the inherent danger of the acts specified therein irrespective of knowledge or intention to produce the result and irrespective of the result. In other words, those sections fix their attention on the acts themselves and make the acts likely to cause death or injury to human life punishable. If acts of this kind are done with knowledge of the dangerous consequences that they are likely to produce, then the culpability is greater and if death is caused then the law punishes not merely for the act but also for the resulting homicide and the case comes within S. 299 or S. 300 according as the act was done with one kind of knowledge or the other. The distinction between this part of the two sections on the basis of which such culpable homicides are placed within the category of murder or in the category of culpable homicide not amounting to murder is founded on the degree of risk to human life. In cases falling within this group knowledge of the character and likely consequences of the act is the central idea. Intention does not enter into these cases at all. In fact intention is expressly excluded by part 2 of S. 304 under which these cases are punishable. If intention must play no part in these cases and if knowledge, such as I have mentioned, is the only ingredient, as I think it is, then it is, to my mind, difficult to conceive how S. 34 can be applied so as to make several persons guilty of culpable homicide not amounting to murder which falls within (c) of S. 299 but outside (4) of S. 300, whether it can or cannot be shown whose act caused the death. As soon as you say that the offender must be presumed to know and therefore to intend the consequences of his act you inevitably take the case out of this category and bring it within the categories where intention is the main ingredient. If this is so with reference to a single individual it must be so also where several persons are concerned. If the common intention referred to in S. 34 is an intention, shared by all the offenders, to commit the offence actually committed, as on the authorities I have cited it must be, then logically S. 34 cannot possibly apply to an offence in which intention is not an ingredient at all. It is an obvious contradiction in terms to say that several persons are to share an intention which does not and must not exist. (c) of S. 299 and (4) of S. 300 exclude intention, separate or common, and consequently exclude S. 34 by necessary implication. Part 2 of S. 304 expressly excludes intention and, in my judgment, cannot possibly be read with S. 34, Penal Code.

Reference has been made to the English case in (1880) 6 Q.B.D. 79⁵ where three persons went out to practise rifle shooting in a field in proximity to certain roads and houses and each fired shots and a boy in a neighbouring garden was killed. All the three persons were held guilty of man-slaughter although it was not known whose shot had killed the boy. It has been suggested

that this case has been applied in this country and the three persons placed in similar circumstances in this country will be guilty of culpable homicide not amounting to murder under (c) of S. 299 read with S. 34, Penal Code. A single person doing any rash or negligent act likely to cause death, with knowledge that it is likely to cause death but without any intention to cause death may conceivably be brought within (c) of S. 299 or (4) of S. 300 (compare illus. 4 under S. 300) but if two or more persons are engaged or involved in doing such a rash and negligent act and it is not known whose act has caused the death, then they cannot be brought under either of these sections by reading it with S. 34, for, as we have seen, the latter section does not come into play at all in the absence of a common intention to commit the crime actually committed. They will, therefore, have to be caught under some other section of the Penal Code. It will have to be considered if Ss. 35, 37 or 38 will fit in with the case. If they do not, then recourse may be had to S. 304A. Failing that, it seems to me that the case will have to be dealt with under one of Ss. 279-289 or 336, 337 and 338 for only the negligent or rash act and that without the aid of S. 34 or S. 107. That I apprehend is the real principle underlying the judgment in the very case in 36 Cal. 302⁴ where (1880) 6 Q.B.D. 79⁵ was applied, although I find it difficult to reconcile the reasoning with the actual decision. In 36 Cal. 302⁴ the two soldiers had been charged under S. 304A/114, Penal Code and not under S. 304/34, Penal Code at all. The following observations to be found at pages 307 and 308 will make the position clear :

"We do not think S. 304A, Penal Code, creates any new offence. The object of the Legislature in passing S. 336 was to render criminal the doing of any act so rashly or negligently as to endanger human life or the safety of others. The mere doing of an act so "rashly or negligently," quite irrespective of the consequences, was made an offence We think therefore that both the accused can legally be convicted and punished under S. 304A, Penal Code, because the death of Kachar Singh was directly due to what we hold to be a criminally negligent act on the part of both of the accused within the meaning of S. 304A. We, therefore, think that the law in India is in accordance with what was laid down in (1880) 6 Q.B.D. 79⁵ and that it is not necessary to call in aid S. 34 or S. 107, even assuming that either of these sections could possibly apply when the facts showed that at most the accused were guilty of negligence only."

It will be noticed that the learned Judge saw the difficulty in applying S. 34 which postulates common intention to a case where intention is absent and thought that the negligent act itself, irrespective of the resulting death, should be punished. Logically, therefore, the two soldiers should have been punished under S. 336 and not under S. 304A, for it could not be proved whose bullet killed the man.

In some cases homicide may thus go unpunished but that appears to me to be no cogent reason for straining the language of S. 34 and putting upon it a construction which it cannot bear. I am not of opinion that S. 34 was designed to cover all cases where several persons are engaged in criminal acts. If it were necessary to devise a section so wide and elastic as to cover all cases which the ingenuity of the legal mind may conceive and illustrate by imaginary examples, the task should better be left to the Legislature.

On a consideration, therefore, of the nature of the three groups of culpable homicides not amounting to murders, and the appropriate punishments provided in S. 304 and the real meaning and import of S. 34, Penal Code I come to the following conclusions :

(a) That S. 34 cannot be read with S. 304 in so far as the latter section provides punishment for culpable homicide not amounting to murder falling within the first four exceptions of S. 300 which come within what I have called group (1).

(b) That the two sections may be read together in relation to the rare cases falling within exception 5 of S. 300.

(c) That the two sections may be read together in cases falling within what I have called group (2) of culpable homicide not amounting to murder, i. e., within (b) of S. 299 but outside (2) or (3) of Section 300.

(d) That the two sections cannot be read together in relation to cases falling within what I have called group (3), i. e., within (c) of S. 299, but outside (4) of S. 300.

I now proceed to discuss the few decisions of this Court on the point now under consideration which have been brought to our notice.

The first case is that of A.I.R. 1925 Cal. 913.¹ In this case the complainant Baikuntha went to cut paddy grown by him on a plot of land which his father had bought many years previously from the aunt of the appellants. Baikuntha had with him ten labourers. The appellants and others interfered and when Baikuntha persisted in cutting the paddy the appellants and others assaulted Baikuntha and the labourers. The result of the assault was that three of the labourers received injuries which proved fatal. The learned Sessions Judge framed three separate charges under S. 304 read with S. 34. Walmsley J. severally criticised the charges so framed and noted the confusion made by the Sessions Judge between Ss. 34 and 149 and commented upon the deficiencies in the Judge's summing up. Towards the end of his judgment the learned Judge with the concurrence of Mukherjee J. let fall the following observations :

"There is yet another objection to the charges and the verdict. It is that S. 34 which is based on a common intention cannot possibly be used with the second part of S. 304 which expressly excludes intention. Personally I do not think that it could be used with the first part either, except possibly in very rare cases. However, the point is that the jury have found the accused guilty of committing culpable homicide by doing an act with the knowledge that they were likely to cause death, but without any such intention, in furtherance of a common intention. It is the badly framed charges and the defective summing up that have led the jury to this illogical verdict."

I respectfully agree with the above observations. The rare cases referred to by the learned Judge comprise, as I think they do, the cases which fall within the categories which I have just marked with the letters (b) and (c) in my conclusion.

The second case is that of 45 C. L. J. 131.³ In this case Cuming and Gregory JJ. took a different view which may best be stated in their own language which is as follows :

"Mr. Talukdar argues that to apply S. 34 there must be a common intention and that as there was no common intention to cause death or such bodily injury as is likely to cause death because the definition of S. 304, Part 2, excludes such intention, S. 34 cannot apply. The simple answer to this contention is that although to constitute an offence under S. 304,

Part 2, there must be no intention of causing death or such injury as the offender knew was likely to cause death, there must still be a common intention to do an act with the knowledge that it is likely to cause death though without the intention of causing death. Each of the assailants may know that the act they are jointly doing is one that is likely to cause death but have no intention of causing death, yet they may certainly have the common intention to do that act. No one will dispute that such an act is a criminal act. Clearly S. 34 can apply to a case under S. 304, Part 2."

With the utmost respect to the learned Judges I cannot endorse their view. My objection is that the above observations proceed on a complete misapprehension of the two meanings of the expressions "a criminal act" and "common intention" referred to in S. 34. These observations appear to me to be opposed to the observations made by one of the learned Judges, namely, Cuming J. himself, in the Full Bench case which I have quoted and underlined (here italicized) above. If "a criminal act" in this section means the whole of the different parts of the act resulting in or making up the criminal act namely the causing of death and if "common intention" means the intention to commit that criminal act which is made up of all the different parts of the act, as, I conceive, has been laid down by the Judicial Committee and by his Lordship in the Full Bench case and by other learned Judges in subsequent cases, their Lordships' present observations in 45 C. L. J. 131³ cannot possibly be supported or accepted. Their Lordships in the later case fix their attention on the individual acts only irrespective of the result likely to be produced thereby and limit the common intention to the doing of those acts only and call each of those acts a criminal act capable of being done in furtherance of a common intention and then by applying S. 34 make the perpetrators liable, not only for those acts which it was their common intention to do but, also for the result of those acts which it was not their common intention to produce. This, with great respect, is wholly illogical and a misconstruction of S. 34 and opposed to the decisions I have referred to. In my judgment, properly understood, S. 34 makes the "criminal act" and the "common intention" and the liability co-extensive. Further the knowledge required by S. 299 must be personal knowledge of each assailant of the probable consequences of his own act. How can one share the knowledge of others? For reasons stated above, the observations in 45 C. L. J. 131³ appear to me to be illogical and wrong on principle and opposed to the true meaning of S. 34 as I read and understood it and I record my respectful but emphatic dissent therefrom. Their Lordships purported to treat the observations of Walmsely J. in A. I. R. 1925 Cal. 913¹ which I have quoted above as obiter, but I may observe that if a case is decided on several grounds, none of them ought to be or can be treated as obiter. It does no good to disguise the fact that their Lordships were dissenting from the view expressed by Walmsely J. As I have said, perhaps at a future date that difference of opinion may be resolved by a Full Bench of this Court but until then, for my part I prefer to respectfully accept and follow the views of Walmsely J.

In 41 C. W. N. 575⁹ which comes next in order of time Mr. Sudhanshu Mukherjee successfully raised the question of the impropriety of a charge under S. 304, part 2 read with S. 34, Penal Code,

in connexion with the death of a man named Lachman. In that case there was no evidence which would have entitled the jury to say that the appellant actually caused the unfortunate man's death and accordingly the appellant could only be convicted with the aid of S. 34, Penal Code. After pointing out that the proper way to put the case before the jury was to frame a charge of murder read with S. 34 and in the alternative a charge of grievous hurt read with S. 34, Henderson J. made the following observations at page 576 :

"But that was not the way in which the case was actually put before the jury. The charge was one punishable under S. 304, Part 2, Penal Code. As I had to point out only the other day, the moment the prosecution drop the murder charge, the only common intention is one to give a beating; whereas S. 34 deals with intention, Part 2 of S. 304 deals with knowledge. The result is that in order to establish this particular charge there has to be a peculiar combination of knowledge and intention which would hardly arise in real life. I do not say that the jury cannot possibly convict on such a charge; but before they do so the matter must be thoroughly explained to them. The evidence bearing upon the intention on the one hand and the knowledge on the other must be carefully put before the jury. Nothing of that kind was done in the present case and it is therefore, impossible to uphold this verdict."

Cunliffe J. adverted to the disinclination on the part of the jury to bring in verdicts which might entail the infliction of the death penalty and deprecated the practice adopted by Sessions Judge of accepting the line of least resistance by framing a charge under S. 304. The Court altered the conviction in this case into one under S. 323 and reduced the sentence. In this case Henderson J. used very guarded language and kept the remote possibility of the jury convicting on such a charge under S. 304, part 2 read with S. 34 open. But it seems to me, for reasons stated above, that S. 34 can in no case be read with part 2 of S. 304 and I am prepared to go further than Henderson J. went in this case.

The views expressed by Henderson J. in this case were amplified in the later case in 41 C.W.N. 570⁸ where the appellants had been charged and convicted under S. 304 part 1 read with S. 34, Penal Code. There death was caused of one of the complainant party in a fight over the right to catch fish in a tank. The defence was that the complainant party had invaded the tank which belonged to the accused party and the latter resisted such invasion in exercise of their right of private defence and that at the end of the fight it was found that one of the complainant party had died and that it was impossible to say who was responsible for his death. Cunliffe J. again deprecated the practice of giving to the jury what he called a "loophole." The learned Judge stated as follows at p. 572 :

"Section 304 (1) is in reality an artificial section in the Penal Code. If a Judge directs a jury that they can on certain facts bring in a verdict of common intention to commit culpable homicide not amounting to murder, he has, in fact, said to them, 'You can on the evidence in this case consider that there was a common intention to commit culpable homicide which does not amount to murder because the persons who committed the crime are protected by one of the four exceptions in S. 300,' and a more confusing way of putting a case before a jury cannot imagine. Quite apart from the fact that it

is almost impossible to visualise the practical mentality that can conceive such a common intention, I can understand a common intention to kill some one to defend oneself at all costs. I can understand a common intention to cause hurt to some one in a general sense. But I find it very difficult to comprehend a common intention, among three possibly quite uneducated villagers, to commit culpable homicide not amounting to murder in the language of the Indian Penal Code and man-slaughter in the English Common Law."

After stating the prosecution case and the defence case Henderson J. at p. 574 made the following observations :

"This being the position with regard to the evidence it became very necessary for the learned Judge to give a clear explanation of what would be the effect of this on the prosecution case. Although the charge is lengthy and full of repetition, he entirely omitted to give any such explanation. The verdict of the jury implies not merely that there was a common intention to use force, because on the defence case the appellant's party were entitled to use some amount of force, but also that there was a common intention to exceed the right of private defence. That, to my mind, is absolutely unreal and in nearly every practical case must be ridiculous. The common intention of persons who are defending themselves would be ordinarily either to protect their person or their property. If the attacking party decided that discretion was the better part of valour, no force would be used at all and no injury would be caused to anybody. I do not suppose that two or three persons who have the right of private defence would even in real life have a sort of discussion to reach the common intention of exceeding that right. As the learned Judge did not explain the implication of this to the jury at all, it is possible that they had not the remotest idea of what they were doing and, therefore, they brought in this startling verdict. It is not enough merely to explain the application of S. 34. The learned Judge should then have gone on to deal with the evidence to point out what, if any, there was to support such a theory. Had he done that I have no doubt at all that he would have reached the conclusion that the theory was merely fantastic."

I respectfully agree with the above statement of the law. The unreality and ridiculousness of imputing common intention of exceeding the limit of the right of private defence in relation to exception (2) of S. 300 adverted to by Henderson J. appear to me to apply equally to the other exceptions except the rare cases falling under exception 5. As I have tried to explain in the earlier part of this judgment it is illogical and impossible to conceive two or more persons forming a common intention of committing culpable homicide not amounting to murder which fall within exceptions 1, 2, 3 and 4 of S. 300 and which I have classified in group (1) of culpable homicides not amounting to murder, firstly because the extenuating circumstances which reduce the crime from murder to culpable homicide not amounting to murder, are extraneous to the offender and are not in his control and cannot be brought about by him, and secondly because, the formation of a common intention, before or after the extenuating circumstances referred to in the exceptions come into being connotes or implies deliberation or premeditation, however swift or imperceptible, resulting in a sort of agreement or understanding between the offenders, express or tacit, which will by itself take the case out of these exceptions and make the offenders guilty of nothing less than murder.

The only other case that I need refer to is that in 14 Luck. 660.²¹ After setting out the ingredients of Ss. 299 and 300 and referring to S. 34 Hamilton J. observed at pages 663-664 as follows :

"A common intention is an intention shared by the person who has caused death and by the other assailants who did not themselves cause death. If the act which caused death is neither murder nor culpable homicide because the person who dealt that blow did not have such intention as is specified under Ss. 299 or 300, Penal Code, but only the knowledge which is specified in either of these two sections, there is no intention which can be shared by all the assailants who did not strike the fatal blow and therefore S. 34 cannot apply. The knowledge referred to in Ss. 299 and 300 is personal knowledge of the person who struck the blow and it is difficult to see how it can be shared by his co-assailants, but in any case, S. 34 is restricted to common intention and does not embrace any knowledge."

I respectfully accept the above statement of law which accords with my own view which I have tried to explain above.

Applying then what I conceive to be the true principles underlying Ss. 299, 300, 304 and 34, Penal Code, and which I have discussed and set forth above, to the facts of the case now before us, I am of opinion that the charge in this case under S. 304/34, Penal Code, without any reference to the part of S. 304 under which the alleged offence was sought to be punished was highly prejudicial to the appellants and was improper. We have seen that under part 1 of S. 304 are punished those culpable homicides not amounting to murder which fall within what I have called groups (1) and (2) and under part 2 of S. 304 are punished those culpable homicides not amounting to murder which fall within group (3). We have seen that S. 34 can have no application to cases falling within group (1) (except those within Excep. 5 of S. 300) or group (3). In these circumstances it is obviously necessary to indicate clearly that the charge was for an offence falling in group (2) and punishable under part 1 of S. 304 and as this was not done in this case the charge was defective in material particulars and not permissible in law. Although, in my opinion, it is entirely wrong to try and bring cases under (b) of S. 299 when the surrounding circumstances and particularly the weapons used and the injuries caused indicated clearly that a charge under (2) or (3) of S. 300 would be more appropriate yet I have to acknowledge that by a process of refined reasoning and distinctions less serious cases may logically be brought within (b) of S. 299 and S. 34 may be applied and the offenders may be punished under part 1 of S. 304. But that refined process would necessarily require such clarity and amount of explanation as I do not certainly find in the present charge to the jury at all and the result has been an illogical verdict of guilty under S. 304, part 2 read with S. 34, which cannot be supported at all.

The result, therefore, is that, on the grounds of misdirection, improper admission of evidence and improper charge as framed and insufficient summing up by the learned Judge resulting in an illogical verdict the conviction and sentence in this case should, in my judgment, be set aside and the accused persons should be retried on a charge under S. 323 read with S. 34. As the jury

did not find the accused guilty under S. 304, part 1 and as Ibra Akanda has been acquitted of the charge under S. 324, this appears to me to be the only course left open to the prosecution.

KHUNDKAR J.—This matter comes before me under the provisions of S. 429, Criminal P. C., as there has been a difference of opinion between my brothers Lodge and Das, in Criminal Appeals Nos. 28, 98 and 104 of 1943.

In all three appeals my learned brothers have differed upon the question whether the principle of joint liability enunciated in S. 34, Penal Code can apply to a case where several persons are jointly charged with, tried for, or convicted of an offence punishable under Part 2 of S. 304, Penal Code which resulted from the joint acts of all.

Section 34 is in these terms :

"Where a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

The relevant portion of S. 304 reads as follows:

"Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death."

The facts of each of the cases, out of which these three appeals arose, were that a number of persons had jointly committed an assault which resulted in the death of the victim, and in each of these cases the jury found that the assailants did not entertain any intention to cause death, or to cause such bodily injury as was likely to cause death, but that they had nevertheless acted with the knowledge that the assault which they were jointly perpetrating was likely to cause death.

A very clear distinction being drawn in S. 304 between intention and knowledge, the question arises whether the principle of joint liability embodied in S. 34 which speaks of "common intention," can be made to apply where the offence committed is one in which intention plays no part, but knowledge is the mental ingredient. This question has been considered before, and two divergent views have been expressed. Before I refer to them, I should attempt to show what, I think, is meant by "act" and "criminal act" as understood in Ss. 33 to 38, Penal Code. By "act" is meant a doing of something—the bare physical act. By S. 33 it includes a series of acts. By S. 36 the word "act," in certain circumstances, includes an omission. "Criminal act" means an act which produces certain effects or results so undesirable as to make it necessary that the act should be punishable. From this it would follow that when the word "offence" is used, it means an act which has certain undesirable effects or consequences, and which is punishable by law. This is consistent with the definition of offence in S. 40, Penal Code.

Coming to S. 34, one view is that "common intention" in that section does not mean the mens rea necessary in law to constitute the criminal act an offence, or, in other words, it is not the same thing as the mental ingredient which the Penal Code requires for the offence committed. "Intention" in S. 34 has nothing to do with the desire or willingness to bring about undesirable consequences, such as death, or hurt, or wrongful loss, which is what mens rea

21. ('39) 26 A.I.R. 1939 Oudh 207 : 14 Luck. 660, *Sunder Singh v. Emperor*.

contemplates. "Intention" here is merely the desire or willingness to do the immediate physical act. Every voluntary act is preceded by a resolution of the will to perform that act. "Common intention" in S. 34 is no more than such a resolution formed by more persons than one to do one and the same act. A simple example would be where several persons beat another person to death. The criminal act done is the killing. The intention, using intention in the sense of the *mens rea* necessary to convert the criminal act into the offence of murder, is the desire or willingness to cause death or such bodily injury as is likely to cause death. But preceding the act there is also a more immediate intention in the mind of each assailant, and that is the resolution to perform the physical acts of beating. It is this more immediate intention to do a physical act, as distinct from the intention to bring about effects or consequences, which is the "intention" of which S. 34 speaks. If this is what "common intention" in S. 34 means, then there is, it is said, no difficulty in applying the principle of that section to cases where a criminal act is done with knowledge that certain consequences are likely to follow, but without the intention to bring those consequences about. This was the view taken in 31 C. W. N. 314,⁸ and it is the one adopted by Lodge J. In 41 C. W. N. 575,⁹ it was observed by Henderson J. that, though such a combination of knowledge and intention would hardly arise in real life, it would not be impossible. In 41 C. W. N. 570⁸ the same learned Judge observed with reference to an offence punishable under part 1 of S. 304, that theoretically it was not impossible to apply the principle of S. 34 to such an offence also.

The other view is that "common intention" in S. 34 means the *mens rea* or mental ingredient required by law to constitute the very offence which has in fact been committed, and must therefore embrace the results of consequences of the physical act of the accused, and further that it means intention in the narrow sense as opposed to mere knowledge that certain consequences may follow. This is the view of Das J. who prefers to follow the decisions in 8 Rang. 603,²⁰ A. I. R. 1925 Cal. 913¹ and 14 Luck. 660.²¹ The observations of Sen J. in 44 C. W. N. 840,²² at p. 844, also would appear to be in conformity with his opinion.

Upon a most careful consideration of the two interpretations of the expression "common intention" in S. 34, and after an examination of the cases abovementioned, as well as others cited at the bar, I am of opinion that each of these two views is fraught with difficulty. I was at one time of the opinion that the interpretation which has found favour with my brother Lodge was the correct one, and in fact the decision in 31 C. W. N. 314⁸ was founded upon an acceptance of the argument advanced from the bar by myself. I now gravely doubt if that argument was sound, for it overlooks the implication of the words: "In furtherance of." Let me take one of the illustrations utilised by Lodge J.:

"A and B, two seamen on a ship in the river Hooghly, find X a stowaway in the hold. They bring him on deck and throw him into the river, one holding X by the legs and the other holding X by the arms. Throwing X overboard may be considered one act jointly performed. A and B both intended to throw X overboard. The throwing of X overboard is

an act done by two persons in furtherance of the common intention of both."

I would pause here to assume that X drowns; and that both A and B intended to drown X; there being evidence that they each knew that X could not swim, and that other persons had overheard them saying to each other X should be killed. The common intention, *ex hypothesi*, is to perform the act of throwing overboard, and the criminal act is the murder. Can it be said that murder was committed "in furtherance of the common intention" to throw overboard? Clearly not, but it can be said that drowning was done in furtherance of the common intention to drown. It can also be said that the criminal act of assault was done in furtherance of the common intention to drown.

Let me suggest another example. A and B intend to kill X by poison. A mixes the poison in a drink. B offers the drink to X. X drinks and dies. Murder has been committed by A and B. If "common intention" means no more than to do the physical acts of mixing the poison and offering the drink, then it would have to be said that the murder had been committed in furtherance of the intention to mix the poison and offer the drink, which would be an absurd construction of S. 34. It is quite clear that a meaning has to be found for "common intention" which will fit the description of the criminal act as something done to further the common intention. Now when the offence intended is committed, the act which constitutes the offence is clearly in furtherance of the intention to commit the offence. Again, to take another example, when robbery is intended, and assault is committed because the victim resists and will not part with his belongings till he is overpowered, the assault is a criminal act done in furtherance of the common intention to rob. The expression "in furtherance of the common intention" points to the conclusion that "intention" in S. 34 is either the intention to commit the offence which is actually committed—and that would be in most cases the *mens rea* for that offence—or an intention to effect a common purpose, (for such an intention is literally covered by the words "common intention"), even at the cost of doing a criminal act which may be necessary for achieving the unlawful purpose intended in common by all. This was, upon the facts found, exactly the position in 28 C. W. N. 170,² 29 C. W. N. 181.¹⁷ There the facts, as found by the jury, were that a number of men had set out to rob a post office and if necessary to kill. Some of them fired pistols at the post-master and one bullet killed him. It was held that the act of killing was in furtherance of the common intention to rob, and so each of the men was guilty of murder, not excluding the one who never even entered the room, but stood guard at the door. The distinction between an ultimate common unlawful purpose, and the more proximate intention to do an act which will further that purpose, is referred to in the following passage in the judgment of the Privy Council in 52 I. A. 40.¹⁷

"Section 37 provides that, when several acts are done so as to result together in the commission of an offence the doing of any one of them with an intention to co-operate in the offence (which may not be the same as an intention common to all) makes the actor liable to be punished for the commission of the offence."

The other interpretation, that "intention" in S. 34 must be confined to the *mens rea* for the offence actually committed, and cannot embrace

22. ('41) 28 A.I.R. 1941 Cal. 106; 44 C. W. N. 840, *Mujjaffar Sheikh v. Emperor*.

anything else, and further that it is intention in the narrower sense as opposed to knowledge, is in my opinion equally unworkable. My brother Das has attempted to draw security for this view from the provisions of Ss. 299 to 304, which he has analysed with great care and clarity. Valuable as his exposition of those sections is, I do not propose to follow him into that discussion, since, in the view I take of the meaning of "common intention," it is quite unnecessary for the purpose of deciding the question raised in this reference. The interpretation which has commended itself to Das J. contains some infirmities which become apparent only upon a close scrutiny of Ss. 34, 35, 37 and 38.

The basic principle which runs through all these sections is that an entire act is to be attributed to a person who may have performed only a fractional part of it. Sections 35, 37 and 38 begin by accepting this proposition as axiomatic, and each of them then goes on to lay down a rule by which the criminal liability of the doer of a fractional part (who is to be taken as the doer of the entire act), is to be adjudged in different situations of mens rea. The axiom itself is laid down in S. 34 in which emphasis is on the act. This is more clearly apparent from the section as it originally stood, that is prior to 1870 when the words "in furtherance of the common intention of all" were introduced into the section by an amendment. The original section ran :

"When a criminal act is done by several persons, each of such persons is liable for that act in the same manner as if it were done by him alone."

This aspect of S. 34 is brought out in the following passage in the judgment of Lord Sumner in 52 I. A. 40.¹⁷

"In other words, a criminal act means that unity of criminal behaviour, which results in something, for which an individual would be punishable, if it were all done by himself alone, that is, in a criminal offence."

What has to be carefully noted is that in S. 35 and in S. 37 and in S. 38 this axiom that the doer of the fractional act is the doer of the entire act is taken up as the basis of a further rule. Without the axiom these sections would not work, for it is the foundation on which they all stand. Now what has the amendment done to the axiom? It has said that the axiom is not an axiom unless each separate doer of fractions of the whole act entertains an intention which is common to all the doers. The result is that there must be a common intention before the whole act can be attributed to the fractional doer, which means that there must be a common intention before S. 35 will work, or S. 37 will work or S. 38 will work. Without a common intention each of these sections falls to the ground. Das J. holds the view that intention is the mens rea of the crime actually committed, and it must be intention in the very narrow sense as opposed to mere knowledge of the consequences which may follow. Therefore, before Ss. 35, 37 or 38 will work, there must be common intention in this narrow sense. But one of the situations which S. 35 legislates for, is precisely the opposite, for it is a situation in which intention is absent and knowledge present. Then take S. 37. If common intention means the intention which forms the mens rea of the offence actually committed, it must be the same intention as is referred to in the words "intentionally co-operates in the commission of that offence." But it has been observed by the Privy Council in a passage which I have already quoted above, that 'an intention to

co-operate in the offence' may not necessarily "be the same as an intention common to all." But obviously, an intention common to all must be present before the whole act which is the offence may be attributed to the doer of one individual separate act. In S. 38 the difficulty is more apparent. There also the entire criminal act is the act of each person "engaged or concerned in the commission of" it. By reason of S. 34 as it now stands, that is so only if all the persons had a common intention. But if common intention is the mens rea which makes the act an offence, all would be necessarily guilty of the same offence, and not of different offences as the section provides, and the illustration to the section exemplifies.

To my mind there are other difficulties also. For one thing, *Barendra Kumar Ghose's case*² would become difficult to understand. There, obviously the common intention found by the jury was to commit robbery and if necessary, to kill. The intention to kill was latent or implicit in the intention to rob, but it was not the same intention. The intention to rob was one distinct intention, and the intention to kill was another distinct intention. I may put it thus: In *Barendra Kumar Ghose's case*² the finding of fact was that the men set out with an intention to rob, plus an intention to kill provided killing became necessary. This is clear from the summing up of Page J., the trial Judge. The intention with which they set out was the common intention. It was a wide intention because it embraced both robbery and murder. The intention to kill was a narrower and a contingent intention. They would kill only if killing became necessary. This intention later assumed effective, deadly and destructive form in the minds of some of the men when they shot at the post-master. This was the criminal act actually committed, the shooting of the post-master, and the mens rea was the narrower contingent intention to kill. But according to my brother, Das, the mens rea and the common intention must be identical. Now the man who stood guard outside the door not only fired no shot, but in his mind the narrow contingent intention to kill never assumed effective, deadly or destructive form. Therefore, according to this view he had no share in the common intention and he could never be held guilty of murder. But the Privy Council said "even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things, 'they also serve who only stand and wait.' " As I understand the judgment, it was held that he was the doer of a fractional act, at the very least, such an act as standing by or guarding the door, and further that he participated in the common intention which, if it was not the narrower contingent intention only to kill, was, at any rate, the wider intention, equally shared by all, which was the absolute intention to rob, plus the contingent intention to kill if need be.

There is still another difficulty. The axiom in S. 34 requires the presence of common intention. But the section says "where a criminal act is done." Now there are criminal acts, which are punishable as offences but for which the Penal Code requires no mens rea in the sense of intention or knowledge, e. g., a public nuisance as defined in S. 268 and made punishable by S. 290. In such acts mens rea may be absent but common intention must be present if S. 34 is to apply to them. Therefore, mens rea and common intention are not necessarily identical in the sense in which Das J. has understood them to be.

It will now be clear that the expression "common intention" in S. 34 is not free from ambiguity, and therefore in order to ascertain its real meaning it is permissible, and indeed necessary, to consider what are the principles of joint criminal liability in the English Common Law. In the English law these principles fall into three broad categories — those which relate to principals in the second degree (otherwise called accessories at the fact), those which relate to accessories before the fact, and those which relate to accessories after the fact. It is the first category which calls for examination here.

The objection that the Penal Code is not to be construed in the light of English authorities may be met in words of Mayne (Preface to Edn. 1 of *Mayne's Criminal Law of India*) :

"It may, perhaps, be charged against me, that I have adopted a line of discussion which has frequently been reprobated by the Judicial Committee — that of attempting to explain the Code by reference to English authorities. My chief answer must be that, in doing so, I am following the example of the Indian Courts, as will be seen in every volume of their reports. It is quite certain that whenever an appeal is preferred to the High Courts, if any question of law is not covered by Indian authority, it will be discussed with reference to English text books and decisions. I have attempted to supply the local Bar and Bench with the authorities by which their proceedings will undoubtedly be tested on appeal. In most cases, however, the objection is itself inapplicable. The Penal Code supplies a series of clear and definite rules, which are to be found in numbered sections, instead of having to be hunted for through a library of law books. The application of the rules depends upon the facts of each case, which shade away by infinite degrees from absolute certainty to the slightest suspicion. In such cases the recorded experience of centuries of English experts must be of the highest importance.

I have to acknowledge my continual obligation to the great works of late Sir James Stephen, which can never be overlooked by any one who is interested in criminal law. I have also constantly borrowed from the Code of English Criminal Law, drawn up and reported on in 1879. The first draft of this Code was prepared by Sir James Stephen under instruction from the Government. It was introduced as a Bill in the House of Commons by the Attorney-General, and was at once referred to a Committee consisting of Lord Blackburn, Luch L. J., Barry J. (an eminent Irish Judge) and Sir James Stephen. By them it was minutely examined line by line, and again issued with their emendations, and with a report, which was written by Sir James Stephen. There the matter ended as regards Parliament but although the draft Code will probably never become law, it and the report upon it will remain as an authentic record of what the English Criminal Law was believed to be by the greatest Criminal Lawyers of the day."

In 29 C.W.N. 181¹⁷ the Privy Council observed at page 192 :

"It is however equally true that the Code must not be assumed to have sought to introduce differences from the prior law. It continues to employ some of the older technical terms without even defining them, as in the case of abetment. It abandons others, such as principal in the first or the second degrees but it must not be supposed that, because it ceases to use the terms, it does not intend to provide for the ideas which those terms, however imperfectly, expressed."

I do not propose to burden my judgment with the English cases which illustrate the working of the rules which apply to principals in the

second degree (accessories at the fact). The most important of these, together with statements of the principles which these cases illustrate will be found in Halsbury Vol. 9, Arts. 30 to 32 ; Russell on Crimes, Vol. 2, pages 1470 and 1472 to 1481; Archbold's Criminal Pleadings, Edn. 28, pages 1446 to 1450.

The classic attempt, referred to by Mayne, to express in codified form the principles of the English Criminal Law was an undertaking which followed upon the first publication of Stephen's "Digest of the Criminal Law, Crimes and Punishments" Chap. 4 in Edn. 7 of Stephen's "Digest of the Criminal Law" treats of parties to the Commission of Crimes, Principal and Accessory. Article 53 in that chapter is headed "Common Purpose," and I think it would be instructive to set out the whole of that article, together with the illustrations appended to it which are all deduced from decided cases :

ARTICLE 53

COMMON PURPOSE

"When several persons take part in the execution of a common criminal purpose, each is a principal in the second degree, in respect of every crime committed by any one of them in the execution of that purpose.

If any of the offenders commits a crime foreign to the common criminal purpose, the others are neither principals in the second degree nor accessories unless they actually instigate or assist in its commission.

Illustrations

(1) A constable and his assistants go to arrest A at a house in which are many persons. B, C, D and others come from the house, drive the constable and his assistants off, and one of the assistants is killed either by B, C, D or one of their party. Each of their party is equally responsible for the blow, whether he actually struck it or not.

(2) Three soldiers go to rob an orchard. Two get into a fruit tree. The third stands at the door with a drawn sword, and stabs the owner, who tries to arrest him. The men in the tree are neither principals nor accessories, unless all three came with a common resolution to overcome all opposition.

(3) Smugglers fight with revenue officers. In the fight a smuggler fires a gun which kills another smuggler. The gun was not fired at any of the revenue officers. The man who fired the gun is responsible for the act, but not his companions.

(4) Two parties of persons fight in the street about the removal of goods to avoid a distress. One of the persons engaged kills a looker-on, totally unconcerned in the affray. The other persons present are not responsible for his crime.

(5) Two persons go out to commit theft. One, unknown to the other, puts a pistol in his pocket, and shoots a man with it. The other person is not responsible for the shot.

(6) Three persons go out to practise with a rifle and manage their practice so carelessly that a person is killed by a shot fired by one of them ; all are guilty of man-slaughter."

With regard to this last illustration, I would observe in parenthesis here that in English law, mens rea in this instance would presumably be considered to be compounded of knowledge of the possible fatal consequences, coupled with an attitude of indifference towards those consequences.

Upon an analysis, the principle stated in Art. 53 of Stephen's Digest is seen to resolve itself into the following propositions :

Where several persons are animated with the desire to carry out one and the same criminal purpose whatever that purpose may be, then :

(1) If in the execution of that purpose, *A* does criminal act *X* and *B* does criminal act *Y*, *B* is to be regarded as the doer not only of *Y* but also of *X*. Thus *A* and *B* entertain the common criminal purpose of committing robbery with violence. The common purpose embraces the element of violence. *A* commits that offence and *B* is present and assists him. *A* has committed robbery with violence, and *B* has committed robbery with violence. But in the course of the operation *A* kills the victim. *A* has committed murder and *B* has committed murder. This rule applies even when *B* has not specifically consented to the degree of violence which was in fact used. (1930) 22 Cr. App. R. 148.²³ It is to be noted that the criminal act of *A* becomes the criminal act of *B* and vice versa.

(2) If in the operations carried out for the purpose of executing a common criminal purpose conceived by *A*, *B* and *C*, *A* by himself alone does a criminal act which is foreign to that purpose, such criminal act does not become the criminal act of *B* or of *C*. If *A*, *B* and *C*, with the common criminal purpose of stealing fruit, go to an orchard, and *B* and *C* climb a tree, while *A* stands at the gate to keep watch, and the owner comes along and *A* kills the owner, the criminal act of killing does not become the criminal act of *B* and *C* unless they along with *A* entertained the additional intention to overcome all opposition at all costs. This is illus. 2 above to Art. 53 in Stephen's Digest, and it is taken from Foster's Crown Cases p. 353. It is to be noted that there are two possible alternative ways of looking at this rule, both of which lead to the same result, which is that *B* and *C* are not liable for the crime of murder. It may be said that the act of *A* does not become the act of *B* and *C*, or it may alternatively be said that whereas the act of *A* does indeed become the act of *B* and of *C*, these latter are nevertheless not liable for the crime of murder which the act in law constitutes, because they never possessed the mens rea, viz., the intention to kill, which at one time came into existence in the mind of *A*, and which is in law needed to make the killing the crime of murder.

These are the principles of joint criminal liability which seem to have been carried out in Ss. 32 to 38, Penal Code, (other principles are to be found in Chap. 5), but the method of treatment is somewhat different. The principles with which we are here immediately concerned are considered and discussed in Mayne's Criminal Law of India, Part II, Chap. 4, the opening paragraph of which is as follows :

"The object of this chapter is to examine various sections of the Code in which the accused, though he has not with his own hand committed the substantive offence, has become in a subordinate or secondary manner mixed up with it. Such modes of crime are treated in English law books under the head of principles in the first or second degree, and accessories before or after the fact. In the Code they are dealt with according to the particular manner in which the defendant becomes associated with the crime."

Mayne draws freely upon English cases to illustrate the principles underlying the rules which are embodied in these sections of the Penal Code. Dealing with joint acts, he says :

23. (1930) 22 Cr. App. R. 148, *Rex v. Betts & Ridley*.

"Where an offence is committed by means of several acts, whoever does any of these acts in furtherance of the common design, is guilty of the whole offence (S. 37). If one person steals goods in a house, and hands them to an accomplice outside who carries them away, both are guilty of theft. (1852) 2 Den. C. C. 459=21 L. J. (M. C.) 152.²⁴ If, however, the person outside knows nothing of the intention to steal till the goods were handed to him, he could not be charged with the theft, his offence would be that of receiving stolen property. (1858) Bell C. C. 20."²⁵

Later on the learned author proceeds :

"If several unite for the purpose of committing a particular offence, such as housebreaking, and in the committal of it one of the inmates of the house is killed, it does not necessarily follow that those who were watching outside would be guilty of murder. It would be a question of fact whether it was the common purpose of all, not only to break into and rob the house, but to effect their object by violence if resisted. If those who entered the house had arms, and were known by the others to have them, such an inference would be legitimate: *Dacres case*, (1842) 1 Hale. P. C. 439²⁶ at p. 443; *Duffy's case*, (1830) 1 Lewin 194,²⁷ 23 Cal. 975²⁸ at p. 978. The inference would, of course, be still stronger against those who were actually present when the violence was committed, though themselves unarmed. Where a number of persons combined to take a man by force to the tannah on a charge of theft, and some of them beat him on the way, Peacock C. J. pointed out that while, on the one hand, it did not necessarily follow that the beating was part of the common design, so as to render those liable who were present, but did not join in the beating; so, on the other hand, the fact that they were present and did nothing to dissuade the others from their violent conduct, might very properly lead to an inference that they were all assenting parties, and acting in concert, and that the beating was in furtherance of a common design, B. L. R. Sup. Vol. page 443=5 W. R. (Cr.) 45."¹⁴

The case reported in 5 W. R. (Cr.) 45 is the case of *Gora Chand Gopee*¹⁴ decided in 1866 at a time when S. 34 read as follows :

"When a criminal act is done by several persons, each of such persons is liable for that act in the same manner as if the act were done by him alone."

Even though there was no express reference in S. 34 to common intention or common purpose, Peacock C. J. said :

"It is laid down that, when several persons are in company together engaged in one common purpose lawful or unlawful, and one of them, without the knowledge or consent of the others, commits an offence the others will not be involved in the guilt, unless the act done was in some manner in furtherance of the common intention."

The learned Chief Justice, it should be noted, was visualising a case where "knowledge or consent" (which are words implying mens rea for the offence actually committed), was absent from the minds of some of the doers of the entire act, yet nevertheless a common intention or "common purpose" was present in the minds of all, and "the act done was in some measure in furtherance of the common intention."

It is clear that Peacock C. J. regarded the element of common intention or common pur-

24. (1852) 2 Den. C. C. 459 : 21 L. J. (M. C.) 152, *R. v. Perkins*.

25. (1858) Bell C. C. 20, *R. v. Hilton*.

26. (1842) 1 Hale P. C. 439.

27. (1830) 1 Lewin 194.

28. ('96) 23 Cal. 975, *Queen-Empress v. Jabanulla*.

pose as implicit in the rule which S. 34 embodied, though the section itself contained no words expressly indicating such an element. That element had indeed always to be read into the section to save it from absurdity, for if one had to confine oneself strictly to the language of the section as it stood before the amendment, some startling results would have followed, and criminal acts could have been attributed even to innocent agents. If I secretly mixed poison in a drink and handed it to a servant to offer to a guest, and the latter drank it and died, the criminal act of murder would have had to be regarded not only as my act, but also as my innocent servant's act; a result which would be monstrous. The truth is that S. 34 in the Code of 1860 seems to have been designed to express only a part of the rule relating to joint responsibility, and was by itself incomplete. It drew attention only to the criminal act which it attributed to all the doers of fractional portions of the act, and it did not say what criminal offence any doer of a fractional portion was to be adjudged guilty of. The offence was to be fastened on the doer of a fractional portion according to his own individual mens rea, and the rules which regulated the function of fastening the offences on the doers of fractional portions were embodied in the subsequent sections. These I shall discuss later. Here I will content myself by merely pointing out that it was this incompleteness of the original S. 34 which occasioned the amendment of 1870.

It is to be carefully noted that the addition of the phrase "in furtherance of the common intention of all" was not for the purpose of enunciating the self-evident proposition that "mens rea" was necessary before a "criminal act" could be treated as an offence. The requirement of mens rea is laid down in each section of the Code which creates an offence. As already indicated, the real operation of S. 34 was to take a completed criminal act, and then to attribute the whole of that criminal act, (by which is meant the physical act plus its effects or consequences, e. g., beating plus death or beating plus hurt), to each separate doer of a fractional portion of the act, (e. g., each person who struck a blow). The new words were introduced into the section merely for making express what was already implicit, which was that the section would not have its operation of attributing the entire criminal act to one individual doer of a fraction of that act, unless the fractional act was one which helped on a purpose which was shared by all the individual doers. The object of the amendment was to make it plain that this rule would have application only where a nexus existed between the minds of individual doers. To express the mental nexus the phrase "common intention" was used, and this it is that has given rise to some confusion in a matter which ought to be essentially simple. Regarding the amendment, Lord Sumner in 29 C.W.N. 181,¹⁷ says at p. 192 of the report :

"In truth, however, the amending words introduced, as an essential part of the section, the element of a common intention prescribing the condition under which each might be criminally liable when there are several actors Really the amendment is an amendment in any true sense of the word, only if the original object was to punish participants by making one man answerable for what another does, provided what is done is done in furtherance of a common intention, and if the amendment then defines more precisely the conditions under which this vicarious or collective liability arises."

The Privy Council in 52 I. A. 40¹⁷ were not dealing with the exact nature of the mental nexus, or in other words with the precise meaning of the phrase "common intention". What they were directly concerned with was an argument regarding the meaning of the words "criminal act," and "that act" in S. 34. The argument with which the Privy Council dealt was previously advanced in *Barendra Kumar Ghose's case* before a Full Bench of this Court, the judgment of which is reported in 28 C. W. N. 170.² The question which arose for consideration was succinctly stated by Richardson J. in the following words, at p. 212 of the report :

"The precise point for determination as I conceive, is whether the liability imposed by S. 34, with which we are chiefly concerned, extends only to principal in the first degree or whether it also extends to principals in the second degree or accessories at the fact. The narrower view is urged for the accused the wider one for the Crown."

That having been the argument, Lord Sumner delivering the judgment of the Privy Council said :

"Section 34 deals with the doing of separate acts, similar or diverse, by several persons ; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for 'that act' and 'the act' in the latter part of the section must include the whole action covered by 'a criminal act' in the first part, because they refer to it." 29 C. W. N. 181¹⁷ at p. 189.

Later on at p. 192, Lord Sumner says :

"In other words, 'a criminal act' means that unity of criminal behaviour which results in something; for which an individual would be punishable if it were all done by himself alone, that is, in a criminal offence."

Although, as I have stated, the Privy Council were not dealing with the question which has arisen for determination in the present case, the conclusion at which they arrived is in accord with the view that "common intention" in S. 34 is not necessarily identical either with the immediate intention to do a physical act, or with the mens rea required for the offence actually committed, and that it may amount to what is really a wider purpose in which mens rea for the offence actually committed is included as a dormant factor. As I have already shown, the jury's verdict in 28 C. W. N. 170² involved the finding that all the persons concerned with the offence set out with the purpose of committing robbery, and of killing provided killing became necessary. The purpose in furtherance of which the killing was done embraced more than the latent and contingent intention to kill. It extended to the avowed and absolute intention which was to rob. It is in this sense that common intention has been interpreted in 14 Lah. 814.²⁹ The head-note of the report which is a correct summary of the judgment is as follows :

"Four persons went armed with guns to the house of K. S. to commit a robbery. K. S. being absent, S. S. and another of the robbers got the minor son of K. S. to take them to the field where K. S. was working. During their absence the other two robbers remained at the house, one of them I. S. taking his stand near the main door which he closed. Two grown-up sons of K. S. who were at their shop close by, having had their suspicions aroused, then came to the house and pushed open the main door, whereupon I. S. fired at them and killed Kehr Singh, one

29. ('33) 20 A. I. R. 1933 Lah. 819 : 14 Lah. 814, Indar Singh v. Emperor.

of the brothers. I. S. was convicted under S. 302 and S. S. under Ss. 302/34. It was contended that S. 34 was not applicable as S. S. was absent at the time of the murder and could therefore not have participated in the crime.

Held, that the contention must be overruled. All that S. 34, Penal Code, requires is that the accused is one of the participators in the joint criminal action in the course of which the murder is committed, and in the present case the accused S. S. though temporarily absent, was participating in the joint criminal action in the course of which the murder was committed."

Regarding the common intention Bhide J. said :

"In the present instance the common intention of the culprits was obviously to commit robbery and in furtherance of that intention different acts were committed by different persons. Sardara Singh had gone to fetch Kishen Singh for carrying out that common intention while Indar Singh shot down Kehr Singh in furtherance of the same. The decision to shoot Kehr Singh was taken by Indar Singh alone but there can be no doubt that it was taken in furtherance of the common intention. The object of Indar Singh apparently was to strike terror and disarm all opposition and in this he succeeded; for there was no attempt to offer any effective resistance to the robber thereafter."

With this reasoning I respectfully agree.

I would now consider the relevant sections one by one. In his judgment in the Full Bench case in 28 C. W. N. 170² Richardson J. observed at p. 211 of the report :

"Section 34 and the closely connected Ss. 35, 37 and 38 were intended to lay down compendiously, in the fewest possible words, some elementary principles of criminal liability. They do not create offences and, given the common intention, in practice it does not signify which section applies in any particular case. As matter of construction they are interpretative clauses, included in the chapter of General Explanations, and must be read into the Code definitions of substantive offences."

Section 34 begins by speaking of "a criminal act," it starts with the assumption that a criminal act has been committed. Now a criminal act may be an offence of one of two kinds : (a) one which is punishable even if there is no mens rea, such as an offence under S. 283 or S. 290, Penal Code ; (b) one which requires the mens rea stated in the section of the Code which defines the offence which that criminal act may turn out to be. As regards class (a), there is no difficulty, for it is per se an offence, and, by operation of what S. 34 goes on to enact, each and every person who performs a fractional part of the act is to be regarded as the performer of the whole of it. But class (b) raises a very obvious difficulty, for one of the doers of a fractional portion of the act may not have the necessary mens rea. Is he to be considered as culpable as other doers who have mens rea. As already pointed out such a result has been avoided by the introduction of the words "in furtherance of the common intention of all," which means that before a particular doer of a fractional portion of the criminal act can be fastened with criminal liability for the entire act, it will have to be shown that he shared the common purpose of all the doers, and also that the entire criminal act furthered the accomplishment of that purpose. Before the amendment of 1870, the section as it then stood literally rendered liable class (b) as well as class (a). But at that time S. 34, in so far as it was express, was only a partial enunciation of the

real principle. As far as its language went, it was incomplete, and the remainder of the principle had to be provided for in other sections.

Section 35 took the matter up, and it started at the point where S. 34 left off. Class (a) being offences for which no mens rea was requisite, it had been already completely legislated for by S. 34. But as to class (b), it was necessary to say something further in order to make it clear that culpability in this class of offence depended upon the nature of the offender's mens rea. Section 35 accordingly started with the words

"Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention"

I would pause here for a moment to point out that S. 35 like S. 34 assumes that a "criminal act" has been committed. It says "an act, which is criminal." Except in the grammatical structure of the phrase, I can see no difference between these words and the expression "criminal act", which is what occurs in S. 34. An act which is criminal is obviously the same thing as a criminal act. Next, S. 35 goes on to enact that if the offence which the criminal act is found to constitute, requires knowledge then only that fractional doer who was possessed of such knowledge is to be adjudged liable for the offence. This is clear from the closing words of the section, "as if the act (meaning the whole act) were done by him alone with that knowledge."

I would again pause, this time to point out, that the difficulty which prevented my brother Das from holding that S. 34 could ever be read with the second part of S. 304 is now seen to disappear. Section 35 has actually contemplated and spoken of such a situation. It may be, as observed more than once by Henderson J., that the situation is of rare occurrence and not usually met with in real life. But it is not an inconceivable situation, and S. 35 expressly provides for it. True it is that if this particular principle of joint responsibility is to be invoked, the proper section to appear in the charge would be not S. 34 but S. 35. But as the Full Bench held in 28 C.W.N. 170² at p. 222, it is quite unnecessary to refer to S. 34 in any charge, and I should therefore think that the framing of charges in cases where the prosecution contends that each of several accused persons is criminally responsible for the joint act of all, never calls for inclusion of any of the sections 34 to 38. See also 7 Pat. 758.³⁰

To proceed, S. 35 also enacts that if the offence which the criminal act is found to constitute, requires intention, then only that fractional doer who was animated by such intention is to be adjudged liable for the offence. Here again this is made plain by the closing words of the section, "as if the act (meaning the whole act) were done by him alone with that ... intention."

At this stage it may be observed that Ss. 34 and 35 have between them covered a considerable area of the field of joint criminal responsibility. But there still remains something more to be said. So far consideration has been bestowed only upon those cases in which the joint completed act is one offence. But as one criminal act may be performed by one person with one mens rea, and by another with some other mens rea, it is possible that the same criminal act may in law amount to one offence in the case of one fractional doer, and to another offence in the

30. ('29) 16 A.I.R. 1929 Pat. 11 : 7 Pat. 758, Bhondur Das v. Emperor.

case of another. The tale is here taken up by S. 38, which deals with several fractional doers of a joint act in circumstances where it is possible that one had one kind of mens rea, and another had another kind of mens rea. The rule is so clearly and simply expressed in the language of the section and in the illustration to it, that no discussion is called for. I shall therefore content myself with a bare setting out of the section and the illustration.

"Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act.

Illustration.

A attacks Z under such circumstances of grave provocation that his killing of Z would be only culpable homicide not amounting to murder. B, having ill-will towards Z, and intending to kill him, and not having been subject to the provocation, assists A in killing Z. Here, though A and B are both engaged in causing Z's death, B is guilty of murder, and A is guilty only of culpable homicide."

Section 36 presents no difficulty in the present case for it merely says that "act" and "omission" are to be regarded as interchangeable terms in those cases where the causing of a certain effect, or an attempt to cause that effect, by an act or by any omission, is an offence.

Section 37 commences by assuming that an offence has been committed, which implies a criminal act plus mens rea. It further assumes that the criminal act is made up of distinct acts done by different persons as exemplified in the illustration. And then it provides that each of those persons is guilty of the offence provided he performed his own act with the mens rea which the offence requires. This mens rea, as the Privy Council pointed out in 52 I. A. 40¹⁷ need not necessarily be the same thing as the intention common to all, or in other words the purpose by which all the performers were animated. Looked at from one point of view, the section, in effect, says that in the circumstances assumed, it is no defence for the doer of any of the distinct acts, who had the mens rea for the offence, to say that as his own act was one entire completed act, the offence which was constituted by the totality of all the separate acts of the individual performers, was not his offence.

It will be seen from what I have said before, that the introduction of the words "in furtherance of the common intention of all" into S. 34 has caused a certain overlapping with S. 35. In those cases where on the facts common intention is, as it may very well be, exactly the same in its actual range as the mens rea needed to convert the criminal act into an offence, the same principle is contained in S. 35 as is stated in S. 34. 14 Lah. 814²⁰ provides an instance of where it would be appropriate to employ S. 34 rather than S. 35. The common intention there was to commit robbery, and the intention to resist interference even to the length of killing, was included in the intention to rob, not prominently but in a latent or dormant form. To use a homely phrase, the intention to kill was at the back of the robbers' minds. It was this wide "common intention" that made the act of killing (done in furtherance of it) the criminal act, and also the offence, of the absent accused. But take another case — a man has two enemies both of whom set out with the single purpose of murdering him, and then one of them stabs him to death while the other holds him by the arms. The common intention is to kill. The stabbing

is done in furtherance of that common intention. It is S. 34. It is also S. 35, because the criminal act of stabbing requires mens rea in order to be the offence of murder, the act was done by both assailants, and each of them had the requisite mens rea, that being the intention to kill.

I am led to the conclusion that "common intention" cannot be given a constant connotation. What it actually is, varies with the facts of each case. There are cases in which it is identical with the mens rea required for the offence actually committed. There are others in which its horizon is wider, like the cases in 28 C. W. N. 170² and 14 Lah. 814,²⁰ where the real common intention was to do a criminal act the accomplishment of which might require some other criminal act to be committed. In these cases the mens rea which makes the ancillary act a crime would be regarded as embraced by the common intention, not as a primary intention, but as a secondary and contingent intention, not in the forefront of the conscious mind, but latent or dormant therein.

The objection may be taken that this is reducing S. 34 to S. 149, but that is not so. Section 149 differs from S. 34 in the following respects: (1) It requires an assembly of five persons. (2) The common object must be one of those specified in S. 141, whereas according to the strict language of S. 34 "common intention" may be any intention at all. (3) The offence actually committed is required by S. 149 to be one which the members of the unlawful assembly knew to be likely to be committed in prosecution of the common object. It need not be a criminal act in actual furtherance of the common object which under S. 34 it has to be. (4) Section 34 requires some act, however, small to be done whereas under S. 149 mere membership of the unlawful assembly is sufficient. (5) Section 34 enunciates a mere principle of liability, but creates no offence; S. 149 creates a specific offence.

It follows that, as already indicated, I cannot concur with my brother Das in the view that the principle of S. 34 can never be applied to an offence punishable under the second part of S. 304. I am further of the opinion, for the reason stated in the earlier portion of my judgment, that "common intention" cannot always be made to coincide with what, for want of a better term I may call 'volitional' intention, that is to say, the bare resolution of the will, divorced from any contemplation of criminal consequences, just to do a physical act. This is sufficient to dispose of the common question raised in the three appeals.

Before I leave this subject, however, I ought to add that I am inclined to endorse the observations of Henderson J., that in actual fact, cases in which the principle enunciated in S. 34 can be applied to an offence punishable under the second part of S. 304, are not of very frequent occurrence. Cases of the type out of which the appeals here dealt with have arisen, are really cases in which the offence committed is in fact murder punishable under S. 302. In order to allay the qualms of juries who, in this province, are notoriously averse to returning affirmative verdicts on capital charges, Judges frequently go to artificial lengths, in leaving open an avenue to a verdict under S. 304, part 2, when the evidence shows that it is either murder or nothing.

In my opinion, Judges, in charging juries in cases like the present, would do well to explain in their own words so much as may be necessary of the entire principle of joint responsibility. To confine the jury's attention to S. 34

alone, as is nearly always done, may be quite wrong, for even as it now stands that section does not embody all the aspects of the principle, which is really spread out between Ss. 34 to 38. As already indicated above, none of these sections need be specified in the charges framed, and it follows that, if one of them is mentioned, the Judge is still free to gather the rule which actually applies to the facts of the case from the other sections.

My brothers Lodge and Das have differed on other points in Criminal Appeal No. 28 of 1943, but for a disposal of this appeal it is necessary to consider only one of them. The point relates to the index to the sketch map prepared by the investigating police officer, Ex. 4. On the map certain spots are indicated by letters of the alphabet. In the index occurs the statement "A is the house of Manikulla Munshi, 7 rashis west from the place of occurrence and where witnesses assembled for certain enquiry." Now the fact that the house of Manikulla Munshi was 7 rashis from the place of occurrence is a fact which the investigating officer presumably ascertained by personal observation. If this was so, the fact should have been established by the evidence of the officer at the trial. Thus established, this fact would not be open to objection. The same cannot be said of the other facts embraced in the statement. How did the officer come to learn that Manikulla Munshi was in possession of the house which stood at the spot marked A in the map? How again did he get to know that persons who later claimed to be witnesses of the occurrence were assembled at Manikulla's house at the time of the occurrence? Obviously he was told as much by witnesses during police investigation. The first fact could and should have been brought out in the examination of Manikulla or of some other inmate of his house, and the second fact should have been proved by the evidence of those witnesses who claimed to have been at Manikulla's house when the occurrence took place. As far as I have been able to ascertain however, the first fact was imported into the record from the map and the index and the evidence of the investigating officer. Such a procedure was a clear violation of the provisions of S. 162, Criminal P. C., as pointed out in 30 C. W. N. 142,¹² following the earlier cases in 52 Cal. 172³¹ and 29 C. W. N. 842.³² I would observe in this connexion that information derived from witnesses during police investigation, and recorded in the index to a map, must be proved by the witnesses concerned, and not by the investigating officer. If sought to be proved by the evidence of the latter, this kind of information would manifestly offend against S. 162, Criminal P. C.

In my opinion the situation which arose here is not saved by S. 167, Evidence Act, because this was a jury trial and it is impossible to say that the verdict was not influenced by what was contained in the index of the map. The fact that some of the identifying witnesses were there at all was challenged by the defence. The prosecution maintained that just before the occurrence they were at Manikulla's house. That this house was close to the place of occurrence—in fact at the spot marked A in the map—was therefore of the utmost importance, and it was partly estab-

lished by the index to the map which contained statements hit by S. 162, Criminal P. C.

This appeal (No. 28/43) must accordingly be allowed. The convictions of the appellants and the sentences passed on them are set aside, and it is directed that they be re-tried according to law.

Criminal Appeal No. 104 of 1943 is dismissed, as the only question in that appeal is whether S. 34 can have operation where the offence charged is one punishable under part 2 of S. 304 and that question has been answered by me in the affirmative.

Criminal Appeal No. 98 of 1943 is dismissed for a similar reason.

I would like to add a word of appreciation for the assistance I have had from the arguments, and for the care and thoroughness with which the main question has been presented by Mr. Dinesh Chandra Roy and Mr. Anil Chandra Roy Choudhury.

R.K.

Re-trial ordered.

A. I. R. (31) 1944 Calcutta 364

DAS J.

Radha Ballav Bose — Applicant

v.

Nagendra Nath Mitter and others —

Respondents.

Appln. in Suit No. 706 of 1939, Decided on 16th March 1943.

(a) Calcutta High Court Rules (Original Side) — Costs — Taxation of — Review is entertained only when principle is involved — Question only of amount or of exercise of discretion — No interference.

The Court entertains a review of taxation and interferes only where a question of principle is involved. The Court is generally unwilling to interfere where it is a question whether the Taxing Officer exercised his discretion properly or if it is only a question of the amount to be allowed. [P 366 C 1, 2]

(b) Calcutta High Court Rules (Original Side) Chap. 9, Rr. 6, 7 and 8 — R. 8 is complementary to Rr. 6 and 7 — Operation of, is limited to cases of obtaining office copy under Rr. 6 and 7.

Rule 8 is complementary to Rr. 6 and 7 and should be read along with those preceding rules. The words "whether filed spontaneously or in compliance with an order" in R. 8 indicate that the copy which is referred to in R. 8 is copy which is taken from Court where the statement has been filed spontaneously or in compliance with an order. The operation of R. 8 should be regarded as limited to cases of obtaining office copy under the preceding Rr. 6 and 7. [P 367 C 1, 2]

(c) Calcutta High Court Rules (Original Side) — Conflict between defendants inter se — Affidavits of co-defendants — Charges are allowed as between party and party.

Charges are allowed for perusing affidavits of co-defendants on an originating summons where there is conflict between the co-defendants because the conflict of interest alone determines who are the real opposite parties irrespective of the superficial alignment of parties in the cause title. [P 367 C 2; P 368 C 1]

(d) Calcutta High Court Rules (Original Side), Chap. 36, Rr. 33, 34, 91 — Hearing of originating summons on three different dates — Party and party costs — Brief fee and refresher under R. 33 — How they are to be computed, explained.

31. ('24) 11 A. I. R. 1924 Cal. 1029 : 52 Cal. 172, Emperor v. Abinash Chandra Bose.

32. ('25) 12 A. I. R. 1925 Cal. 909 : 29 C. W. N. 842, Emperor v. Mofizel Peada.

Originating summons was heard on three different dates. In all, the case took more than nine hours. After the first hearing of 3½ hours, the case was adjourned for a week. The second hearing however began after a year and took about three hours. The third hearing was for about 3½ hours and the judgment was then reserved :

Held that in taxation between party and party, a brief-fee for first day and a refresher under Chap. 36, Rule 33 should be computed according to the time taken. A refresher for the adjourned hearing should also be allowed under Chap. 36, R. 34 which is to be decided by the Taxing Officer. The brief-fee was not worked off on the first day of hearing on the case being adjourned for over a month. The computation of time did not begin anew on the second day of hearing. [P 369 C 2]

S. R. Das Gupta — for Applicant.

S. Banerjee — for Respondents.

ORDER.—This is an application for review of taxation of the Taxing Officer in respect of the Bill of Costs of Messrs. R. C. Basu & Co., attorneys for the applicants. The bill was lodged for taxation under the decree passed on 24th July 1941 on an originating summons which was marked as Suit No. 706 of 1939 O. S.

The originating summons was concerned with the will dated 3rd August 1863 of Raja Sir Radhakanta Deb Bahadur who died on 19th April 1867. The will was duly probated on 1st May 1867.

By his will the Raja appointed two persons as executors and trustees and gave directions to them to pay Rs. 300 to each of his three sons separately with remainder to their respective children and descendants per stirpes. There were various other legacies which it is not necessary to refer to for the purpose of this application.

Shortly after the death of the Raja his will became the subject-matter of litigation in this Court which went upto the Court on appeal. By the decree passed on 20th September 1869 in Appeal No. 1 of 1869 it was declared that the estate of the Raja was by the will vested in the trustees therein named for the purposes of carrying into execution such of the trusts of the said will as were good and valid as in the said decree declared and that subject to the said valid trusts the estate upon the death of the Raja descended to his three sons and heirs at law. One of the trusts declared valid by the decree was that each of the three sons got an annuity of Rs. 300 for life with remainder to his children living at the time of the Raja's death.

There were various subsequent litigations the details of which are not relevant for the purpose of this application. Broadly speaking, the nett result of these litigations was that certain properties were set apart for the payment of the annuities, debseba and sradh expenses being the trusts declared valid and the rest were divided amongst the descendants. There was a provision that the trustee would spend the income of the properties so set apart in paying the annuities and meeting the debseba and sradh expenses and hold the surplus income for the benefit of the descendants of the Raja.

Some of the descendants of the Raja from time to time conveyed and transferred their respective right, title and interest in these properties belonging to the estate of the Raja subject to the valid trusts. It is necessary to refer only to two of these conveyances. One was executed by Kumar Girindra Narain Deb on 24th September 1919

and the other was executed by Radha Kristo Bose on 12th July 1921. Both these conveyances were executed in favour of Surendra Nath Paul and Jatindra Nath Paul. The present applicants are the successors-in-interest of these transferees and are hereafter collectively called the Pauls.

Kumar Girindra Narain Deb died in April 1923 after having made and published his last will. The defendant Nagendra Nath Palit was at the date when the originating summons was taken out the surviving executor of this will and was administering the Kumar's estate. Radha Kristo Bose died leaving his widow Sm. Malina Bala Dassi one of the defendants in the originating summons suit.

I have already said that by the decree passed on 20th September 1869 in Appeal No. 1 of 1869 it was declared that each of the three sons of the Raja got an annuity of Rs. 300 for life with remainder to his children living at the time of Raja's death. The second son of the Raja was named Rajendra Narain Deb. He died in January 1900. On his death the annuity of Rs. 300 was distributed amongst his descendants who were living at the time of the death of the Raja. On the death of each of these descendants, the amount payable to such deceased descendant was distributed amongst the other surviving descendants thus augmenting their share. Ultimately the whole of this annuity of Rs. 300 became payable to Sm. Sukhadaini Dassi as the sole surviving descendant of the second son of the Raja who was alive at Raja's death.

This lady died in January 1937 and thereupon question arose as to what was to happen to this annuity of Rs. 300. One Nagendra Nath Mitra who is one of the descendants of the first son of the Raja and who was one of the persons alive at the date of the death of the Raja claimed this annuity of Rs. 300. The other descendants contended that on the death of the lady this annuity lapsed and fell into the residue and was distributable amongst the descendants. The Pauls contended that on the death of the lady this annuity lapsed and became surplus income and they claimed the shares of Kumar Girindra Narain Deb and Radha Kristo Bose in this amount as such surplus income or as the undisposed of residue. The defendant Nagendra Nath Palit the executor of Kumar Girindra Narain Deb contended and in this he was supported by the defendant Malina Bala Dassi the widow of Radha Kristo Bose that on the lapse of the annuity by death of the lady a new resulting trust arose in favour of the descendants and that this new right had not been conveyed to the Pauls.

It was in these circumstances that Radha Ballav Bose who had previously transferred his interest to Sm. Susama Sundari Mitter took out this originating summons on 25th April 1939 for the determination of the following questions :

(1) Who is entitled to the sum of Rs. 300 per month which has become available on the death of Sm. Sukhadayini Dassi the last surviving annuitant of the branch of Raja Rajendra Narayan Deb ?

(2) Whether the said sum of Rs. 300 per month is to be distributed amongst the beneficiaries ?

(3) Whether by the conveyance dated 24th September 1919 and 12th July 1921 executed by Kumar Girindra Narayan Deb and Radha Kristo Bose the said Jatindra Nath Pal and Biswanath Pal are entitled to any portion of the said sum of Rs. 300 per month ?

(4) Whether Sm. Malina Bala Dassi widow of the said Radha Kristo Bose and the executor of the estate of Kumar Girindra Narain Deb are entitled to receive the same or the proportionate share thereof?

(5) Are the beneficiaries to the estate of Raja Sir Radha Kant Deb Bahadur, K. C. S. I., entitled to ask for release or distribution of the properties or a sufficient portion of the estate in the hands of the trustee on the death of the annuitants?

There were 27 defendants in the summons including the Pauls. The Pauls entered appearance through their attorneys Messrs. R. C. Basu & Co.

On 13th July 1939 directions were given on the parties to file their respective affidavits. Some of the defendants including the defendants Nagendra Nath Palit and the Pauls filed affidavits in support of their respective contentions and claims. After several adjournments the case was called on for hearing on 22nd July 1940 before Ameer Ali J. and was heard for three hours and was adjourned. It is said that on this occasion the case was adjourned for a week only. It appears, however, that the case next came on for hearing about a year later, namely, on 17th July 1941. So it may be taken, for the purpose of this application, that in effect the postponement was for about a year. On 17th July 1941 being the second day of hearing the case was heard for three hours. The next hearing was on 22nd July 1941 when after a hearing of 3½ hours the hearing was concluded and judgment was reserved. Judgment was delivered by Ameer Ali J. on 24th July 1941 substantially upholding the contentions of the Pauls. The learned Judge on that day did not deal with the question of costs. Accordingly on 21st August 1941 Mr. S. C. Bose learned counsel for the Pauls mentioned the matter and the learned Judge directed learned counsel for the trustee defendant to discuss the matter with Messrs. R. C. Basu & Co. attorneys for the Pauls and Mr. P. C. Basu attorneys for the plaintiff as to how the costs should be dealt with. There was a conference as desired by the learned Judge. On 4th September 1941 his Lordship gave directions for costs, namely, that the plaintiff was to pay the costs of the Pauls and that the costs of the trustee should come out of the estate. Later on, on 27th April 1942, the matter was mentioned again before the learned Judge for varying the previous directions for costs and ultimately the learned Judge directed that defendant Nagendra Nath Palit should out of the estate of Kumar Girindra Narain Deb pay the costs of the Pauls as of a defended suit including fees of two advocates. The decree dated 24th July 1941 has been drawn up accordingly.

Pursuant to this decree Messrs. R. C. Basu & Co. attorneys for the Pauls lodged their Bill of Costs No. 814 of 1942 for taxation. The Assistant Taxing Officer taxed the bill and disallowed some of the items of charges. The bill was carried in before the taxing officer and exception was taken to 58 items out of the items disallowed by the Assistant Taxing Officer. The Taxing Officer allowed some of these items and disallowed the rest. The present application is for review of taxation of the Taxing Officer under R. 72 of Chap. 36 of the Rules of this Court. It is directed against the disallowance of items 6, 8 to 15, 25, 27, 28 to 30, 33 to 36, 38 to 40, 43, 47 to 58 of the exceptions.

The principles on which the Court acts in the matter of review of taxation are well settled. The Court entertains a review of taxation and inter-

feres only where a question of principle is involved. The Court is generally unwilling to interfere where it is a question whether the Taxing Officer exercised his discretion properly or if it is only a question of the amount to be allowed. 54 Bom. 62.¹

A perusal of the different rules of taxation will clearly indicate that taxation as between party and party is to be done more strictly than that as between attorney and client. Rules 2 and 3 of Chap. 36 of the Rules of this Court provide that in the absence of specific rules of this Court the Taxing Officer should follow the rules and practice of the Supreme Court in England as his guide.

Keeping these principles in mind I now proceed to deal with the items.

Items 6, 8 to 15: These items contain charges:

(a) for writing letters to the solicitors for the plaintiff and for other co-defendants informing them that clients would use an affidavit in opposition and offering copies thereof;

(b) for writing letters to the solicitors for the plaintiff and for other co-defendants asking for a copy of the affidavit in opposition if their respective clients intended to use any;

(c) for receiving letters from these solicitors asking for copies of clients' affidavit and informing that their respective clients would use affidavits in opposition;

(d) for receiving and perusing copies of affidavits of the other co-defendants, and

(e) for making and delivering additional briefs to counsel.

The Assistant Taxing Officer allowed all these items as between attorney and client but disallowed all these items as between party and party.

The Taxing Officer upheld the decision of the Assistant Taxing Officer but on different grounds.

Mr. S. R. Das Gupta who appears for the applicants referred me to Ch. 13, Rr. 16-19 of the Rules of this Court and pointed out that the originating summons comes before the Court at first without any affidavit in opposition and it is only when there is conflict between the parties on facts that the Court gives directions to the parties for filing their respective affidavits in opposition. He contended that in this particular case the parties being in conflict directions had been given by the Court for filing affidavits and it was essential for them to know what case or contention they had to meet and to appraise their respective counsel of the same and for this purpose it was necessary for them to get copies of their opponents' affidavits and prepare briefs and deliver same to counsel. He then referred me to the notes under the heading "co-defendant's pleadings" in Annual Practice 1940 at p. 1883 where it is stated that on an originating summons and other proceedings where there is conflict between the defendants, the perusal of co-defendant's evidence would seem to be proper to be allowed. He also strongly relied on an unreported judgment of Panckridge J. where in a taxation under a decree passed on originating summons concerning this very estate his Lordship on a review of taxation, while declining to lay down any general principle, allowed similar items of charges. Mr. Das Gupta argued that Chap. 9, R. 8 did not apply to originating summons and submitted that these items should be

1. (30) 17 A. I. R. 1930 Bom. 24 : 54 Bom. 62, Langley v. D'Acry.

allowed. He said that in so far as the items consisted of writing letters they came under items 42 and 43 of R. 91 and in so far as they consisted of receiving letters they came under items 21 and 22 of the same rule and in so far as they related to receiving and perusing the affidavits they came under item 23 of the same rule.

Mr. S. Banerjee drew my attention to Chap. 13, R. 19 and the decree itself which provides for taxation as in a defended suit and contended that the taxation being as in a defended suit the affidavits must be regarded as written statements and the provisions of Ch. 9, R. 8 at once became applicable. He further contended that in so far as the charges came within any of the items of charges allowed under R. 91 of Chap. 36; they depended, under R. 94, entirely on the discretion of the Taxing Officer to decide which of them should be allowed as between party and party and which of them should be allowed as between attorney and client. In this case the Assistant Taxing Officer and the Taxing Officer allowed all these items as between attorney and client and disallowed all these items as between party and party and the Court should not interfere with the exercise of their discretion.

The reason assigned by the Assistant Taxing Officer is that these items are "costs of correspondence between co-defendants and so allowed as between attorney and client." This reasoning overlooks the fact that some of these items are not for costs of correspondence at all but are charges for receiving and perusing copies of affidavits of co-defendants and for preparing additional briefs and delivering same to counsel. The reasons for which the learned Taxing Officer has disallowed these items are stated to be as follows:

"I have read R. 8 of Chap. 9, page 303 and am of the opinion that this must be paid by the party himself and I think that the Assistant Taxing Officer was correct."

It is, therefore, clear that he has not based his decision on the ground of discretion at all. He refers to Ch. 9, R. 8 and his decision is founded on that rule. I therefore consider it open to me to examine whether, on a true construction of the rule, the decision of the learned Taxing Officer is well founded.

Chapter 9 of the Rules of this Court deals with written statement and set off. Rules 6, 7 and 8 of this Chapter correspond to old Rr. 232, 233 and 235 and are in the same language. Rule 6 of this Chapter provides that where both the plaintiff and the defendant are required to file written statements, either party, after filing his own written statement, shall be entitled to obtain an office copy of the statement of the other party. Rule 7 lays down that where two or more defendants are required to file written statements, a defendant, after filing his own written statement, shall be entitled to obtain an office copy of the statement of a co-defendant. It will be noticed that both these rules speak of obtaining "office copy". Then comes R. 8 which is in these terms: "where a defendant shall obtain a copy of a statement of a co-defendant, whether filed spontaneously or in compliance with an order, the costs of obtaining such copy shall, unless otherwise ordered, be borne by himself."

It will be noticed that in this rule the expression "office copy" is not used—a circumstance to which my attention has been drawn and which I do not overlook. I am, however, of opinion that R. 8 is complementary to Rr. 6 and 7 and should

be read along with those preceding rules. Further the words "whether filed spontaneously or in compliance with an order" in this R. 8 seem to indicate that the copy which is referred to in this rule is copy which is taken from Court where the statement has been filed spontaneously or in compliance with an order. Again, this R. 8 appears to me to be designed to protect the interests of the attorneys in the matter of supplying copies of their client's statement on usual terms. A party may obtain office copy of his co-defendant's statement because he does not desire to pay the profit costs of the attorney of the co-defendant. He may do so under R. 6 or R. 7 but under R. 8 he will have to bear the cost of obtaining such office copy. On the other hand, a party may be driven to obtain an office copy of his co-defendant's statement because of the neglect or refusal of the latter's attorney to supply such copy. In such a case obtaining an office copy is not reprehensible and costs should be allowed and it is to meet such a case that the words "unless otherwise ordered" have been inserted in R. 8. In this connection I may refer to item 23 of R. 91 of Ch. 36, which allows charges for "perusing pleadings, proceedings, or documents received from the opposite party or obtained from Court where necessary in the discretion of the Taxing Officer". In this item documents received from the opposite party and documents obtained from Court are separately and specifically mentioned. If R. 8 was intended to cover both these cases, it would have said so separately and specifically in the same terms as in item 23 under R. 91. In my opinion the operation of R. 8 should be regarded as limited to cases of obtaining office copy under the preceding Rr. 6 and 7.

Further, in construing these rules of taxation one must not altogether overlook the substance and principles of the rules. In an ordinary case the plaintiff is on one side and all the defendants are on the other. Generally speaking, the interests of all the defendants are to defeat the plaintiff's claim. If the plaintiff loses his case he ordinarily pays the costs of all the defendants, but in such circumstances it may not be reasonable to make him liable for the extra costs incurred by the defendants who have same interest in obtaining copies of each others' statement or affidavits. In some cases however the real conflict may be between the defendants inter se, as in the case of an interpleader suit where the interpleader has not been discharged or more frequently in the case of originating summons taken out by an indifferent person like an executor or trustee where the real conflict is between the defendants inter se who are the real claimants. In these cases it will not be right to regard and put them on the same footing as co-defendants in an ordinary suit who have a common interest as against the plaintiff. It is on this principle that under the English practice charges are allowed for perusing affidavits of co-defendants on an originating summons where there is conflict between the co-defendants. It is on this principle that the judgment of Panckridge J. to which I was referred, was based, although his Lordship did not desire to formulate any general principle. I see no difference between the situation that arose before Panckridge J. and that is now before me. It is no good disguising the fact that I am basing my decision on what I conceive to be the principle implicit in the English practice and the judgment of Panckridge J. and in our rules. It is that the conflict of

interest alone determines who are the real opposite parties irrespective of the superficial alignment of parties in the cause title. The very fact that in this case one co-defendant was directed to pay the costs of another co-defendant only justifies and illustrates the principle and the rules should be construed and applied to give effect to this principle.

For reasons stated above I set aside the decision of the learned Taxing Officer on these items 6 and 8 to 15.

I must not, however, be taken to imply that the whole of the charges under all these items should be allowed. To take one example, I do not think that the letters written by Messrs. R. C. Basu & Co. to the other attorneys informing them that the former's client would use an affidavit in opposition and offering a copy thereof can be regarded as necessary letters within item 42 of R. 91. At best they can come under item 43 of that rule as a formal letter. On the other hand, again to take an example, writing letters to the other solicitors enquiring if their clients will use any affidavit and asking for a copy thereof may come under item 42 or 43 of R. 91. Likewise receiving letters from the other solicitors informing that their clients will use an affidavit and offering copies thereof may come under item 21 or 22 of R. 91. In respect of all these items 6, 8 to 15 the Taxing Officer will no doubt exercise his discretion in allowing these charges under one or other of these items of Rule 91.

Items 25 and 27.—These have been allowed by the Assistant Taxing Officer as between attorney and client by virtue of the written instructions of client as contemplated by R. 6 of Chap. 36 but have been disallowed as between party and party. The learned Taxing Officer has upheld the decision of the Assistant Taxing Officer. Mr. Das Gupta has contended that when these items are allowed as between attorney and client they must be taken to have been necessary and proper charges and if so, they should be allowed as between party and party also. The reasoning is entirely fallacious. The Taxing Officer may have considered these charges as unnecessary and yet allowed them as between attorney and client, on the strength of the written instruction under R. 6. Further under R. 41 charges for more than one conference or consultation may be allowed where it shall appear to the Taxing Officer that such additional conference or consultation was necessary or proper. The Taxing Officer has exercised his discretion and I see no reason for interfering with his decision. Rule 97 has no application to taxation as between party and party.

Item 28.—This item relates to refresher fees to counsel and attorneys' charges in connexion therewith. It will be remembered that the case was first heard on 22nd July 1940, for 3 hours and was then adjourned, and the second hearing was on 17th July 1941, for 3 hours and the third hearing was for 3½ hours on 22nd July 1941, when the hearing was concluded and judgment was reserved. From these dates it is clear that after the first hearing the case was in effect adjourned or postponed for about a year. It is also clear that the three hearings occupied 9½ hours. The Assistant Taxing Officer allowed the brief fees or first day's fees to counsel and one refresher for the second 4½ hours obviously under R. 33 of Chap. 36. The hearing not having lasted for more than 10 hours he disallowed the claim

for a second refresher as between party and party but has allowed it as between attorney and client. His decision was as follows :

"Allowed under 5 hours rule one refresher the rest allowed under clients written instructions produced and seen as between attorney and client."

Exception was taken to this decision on the ground that on the last two days the case was heard for more than 6½ hours and, therefore, two refreshers should be allowed under R. 34 of Chap. 36. The reasoning appears to be that as there was an adjournment for more than a month the 5 hours should be counted afresh from the second day. The Assistant Taxing Officer did not accede to this contention. The Taxing Officer upheld the decision of the Assistant Taxing Officer and gave his decision as follows :

"28. First hearing 22nd July 1940	...	3 hrs.
Second " 17th " 1941	...	3 "
Third " 22nd " 1941	...	3½ "

I do not think that when a case is partheard and is continued on a subsequent day and then another day and disposed of, R. 33 of Chap. 36 will apply and in this respect I agree with the Assistant Taxing Officer."

In the above quotation the reference to R. 33 appears to be a mistake for R. 34. The decision of the Taxing Officer clearly proceeds on the construction which he places on R. 34 and not on the exercise of any discretion and it is therefore open to me to consider if his decision is well founded. Further the matter is undoubtedly of some importance and it is right that I should deal with it. There is a singular lack of reported decisions on the subject both here and in England.

Under the English practice from which our Rules have been adopted, refreshers are of two kinds, namely, daily refresher and term refresher. Daily refresher is governed by O. 65, R. 27 (48) of the Rules of the Supreme Court. This is regulated by a computation of the actual time taken up by the hearing in Court. Term refresher, which is referred to in item 131 of Master's Practice notes, is only allowed where the case has been in the daily list in the preceding term and not reached, but apply to all cases in Court. This refresher has no reference to the time occupied in hearing the case in Court. It is allowed out of consideration of the mere fact that the case was in the list in the preceding term and was not reached. When a case is on the list counsel has to be ready with his case from day to day during that term. When, therefore, the case is not reached in that term and goes over to the next term there is a break and it cannot be reasonably expected that counsel will carry the matter in his head during the vacation. From a practical point of view counsel has to get ready over again when the next term begins. This seems to me to be the underlying principle on which term refresher is allowed to counsel. In (1883) 28 S.J. 166² which is noticed in Annual Practice 1940 at page 1530 the trial of the action took many days and the Taxing Master allowed both daily refreshers under O. 65, R. 27 (48) and also a term refresher. Summons was taken out before Chitty J. to review the taxation. The question was raised as to the allowance to counsel of term refresher when refreshers from day to day were allowed. Chitty J. overruled this objection and observed that :

"As to the question of term refreshers, both the Registrar and Taxing Master had stated their opinion

2. (1883) 28 S. J. 166, *Levetus v. Newton*.

that it was the established practice to allow them and this being so and as no precedent to the contrary had been produced he should follow the practice as stated and not disturb the Taxing Master's Certificate."

Thus it is clear that in England it is the settled practice to allow term refresher which has no reference to the hours of hearing in addition to daily refreshers which are computed on the basis of the length of time occupied by the hearing.

Turning now to the rules of this Court, I find that formerly we had no specific rule relating to daily refresher. The old R. 780 directed the Taxing Officer to regulate the taxation of charges for retaining and employing counsel, as nearly as may be, by the practice of the Superior Courts in England, reference being had to any difference which may exist between the two countries in the relative value and use of money. This corresponds to our present Rr. 2 and 3 of Chap. 36. From Mr. Belchamber's notes to the old R. 780 I find that daily refreshers were left entirely to the discretion of the Taxing Officer and the Taxing Officer used to follow the English practice and allow daily refreshers on a consideration of the length of time occupied. There was, however, one rule, namely, R. 790, which was in the same terms as our present R. 34 of Chap. 36, namely :

"No refresher should be allowed to counsel on any adjournment or postponement, unless such adjournment or postponement extends beyond the period of one month."

When there was no express mention at all of refresher in other rules, why was this rule specifically prescribed? The obvious answer is that it was intended to make a departure from English practice. In England term refresher was allowed on account of the break between one term and the following term. In following English practice a refresher would have to be allowed if a case went over the Christmas vacation or the Easter vacation both of which in this case last for ten days. Further, the principle on which a term refresher is allowed applies even when a case is adjourned for a substantial period even during one term. So our old R. 790 fixed the period of the break which will entitle counsel to a refresher to a period extending beyond one month. Our old rules were recast and new rules were introduced in 1914. Rule 32 of Chap. 36 of the new rules dealt with fees to counsel. In the table of fees set out in that rule I find a column headed "Refresher." Daily refresher was thus expressly and openly recognized in our rules. In this rule the maximum fees to counsel for first day and for refresher were fixed but the actual amount to be allowed in any particular case or how the amount would be computed

was left to the discretion of the Taxing Officer except that by R. 33 the absent counsel was debarred from charging refresher unless he certified in writing that he had kept himself generally acquainted with the case as it was developed during the course of the hearing. Old R. 790 was reproduced verbatim, without any change, in new R. 34.

These 1914 rules were amended as from August 1933, when the five hour rule was for the first time introduced in R. 32. In this amended R. 32 also there was a table setting out the maximum fees that could be allowed by the Taxing Officer and both brief fee and refresher were mentioned in the table under different columns. There was no amendment of R. 34. Rule 32 was further amended as from November 1939 and brought to its present form. Now R. 32 deals only with brief fees of counsel and R. 33 deals only with refresher computed on the basis of the length of time occupied. Rule 34 which deals with refresher on adjournment stands in the same language as it was under old R. 790. It appears to me that our present R. 33 is adapted from O. 65, R. 27 (48) of the Rules of the Supreme Court, and is concerned with daily refreshers. Rule 34 appears to me to be an adaptation of the term refresher under the English practice with the intervening period fixed at a period of over one month. The rule is in form in the negative but the language implies an affirmative direction, namely, that when the case is adjourned for over a month, a refresher should be allowed. This refresher, being in the nature of a term refresher under the English practice has nothing to do with the daily refresher under R. 33. If we are to follow what has been called the settled practice in England according to the decision in (1883) 28 S. J. 166,² to which I have referred, then this "adjournment refresher," if I may so call it, should be allowed under R. 34, where the adjournment is for over one month over and above the daily refresher, if any, allowed under R. 33.

Mr. Banerjee contended that the note to R. 34 indicates that only an application fee should be allowed. This note is no part of the rule. It was really Mr. Belchamber's note and has been reproduced in all subsequent editions of our rules. In my opinion, this note cannot override the rule. It only explains the rule. Rule 34 in terms applies whether the suit is called on and heard for some time and then adjourned or whether the suit is called on but not heard at all and then and there adjourned, provided, in both cases, the adjournment or postponement extends beyond the period of one month. The note indicates, to my mind, the practice followed by the Taxing Officer, in the second above-mentioned

case, namely, that of adjournment without hearing, in fixing the quantum of refresher that should be allowed and it states that in such a case the practice is to allow only a fee allowable on a substantive application for adjournment. Nor do I agree with Mr. Das Gupta's argument that the brief fee was worked off on the first day of the hearing and that because there was an adjournment for more than one month the computation of five hours should begin anew on the second day of hearing. There is no warrant for such construction. As I have said, the adjournment refresher under R. 34 has nothing whatever to do with the hours of hearing. It is in the nature of a solatium to counsel for having to get ready with the case over again after a long break as in the case of term refresher in English practice.

For these reasons, in my opinion, while the Taxing Officer was right in allowing one daily refresher under R. 33 on a computation of time occupied by the hearing, he has, on principle, gone wrong in not allowing a refresher on adjournment under R. 34. I accordingly allow this item. The amount of charges to be allowed, however, will be decided by the Taxing Officer. (After dealing with the other items his Lordship proceeded.) The result is that I accede to this application for review in respect of items 6, 8 to 15 and 28 and allow these items as between party and party. I also allow items 29 and 30 as between attorney and client only. I do not accede to this application in respect of the other items. I say nothing about the amounts that should be allowed on the items I have allowed. The quantum should be fixed by the Taxing Officer when the Bill goes back to him. I direct that the matter do now go back to the Taxing Officer to be dealt with by him, only as regards the items which I have allowed, in the light of the principles I have endeavoured to lay down. The greater part of the time occupied in hearing this application had been devoted to discussing items 6, 8 to 15 and 28. On these items Mr. Das Gupta has succeeded. On other items involving equally substantial amounts he has failed. In these circumstances, I make no order as to the costs of this application. Certified for counsel as against own client. As regards the costs of taxation before the Assistant Taxing Officer and the Taxing Officer I leave it to the Taxing Officer to decide under R. 71, when the matter goes back to him, whether in the altered circumstances, the applicants should get any part of those costs.

R.K.

*Order accordingly.***A. I. R. (31) 1944 Calcutta 370****MITTER AND SHARPE JJ.**

Indo Burmah Trader's Bank, Ltd. — Appellant

v.

Barada Charan Dhar, on death, Sm. Sita Sati Dhar and others — Respondents.

Appeal (F. M. A.) No. 301 of 1941, Decided on 7th July 1944, from original order of Dist. Judge, Chittagong, D/- 17th May 1941.

(a) Provincial Insolvency Act (1920), S. 17 — Adjudication can be made after death.

Section 17 authorises the Court to pass an adjudication order even after the death of the debtor : ('28) 15 A.I.R. 1928 Mad. 480 and ('30) 17 A. I. R. 1930 Cal. 590, *Rel. on.* [P 371 C 1]

(b) Provincial Insolvency Act (1920), S. 6 (g) — Suspension must be for whole indebtedness.

To bring the case within cl. (g) of S. 6 the notice of suspension must be for the whole of the indebtedness. It must amount to an expression of a general intention to stop payment to every creditor. [P 371 C 2]

(c) Provincial Insolvency Act (1920), Ss. 9 (1) (c) and 6 (b) — Transfer constituting act of insolvency requiring registration — Time under S. 9 (1) (c) is to be reckoned from date of registration, not of document.

For purposes of S. 9 sub-s. (1) cl. (c) time is to be reckoned from the date of the registration of the transfer deed, where the Transfer of Property Act requires a registered instrument for the transfer which is alleged to constitute the act of insolvency : ('38) 25 A.I.R. 1938 Cal. 417, *Doubted ; Case law discussed.* [P 373 C 2]

Rama Prasad Mookerjee and Durgesh Prasad Das — for Appellant.

Gunendra Krishna Ghose for Nripendra Chandra Das and Rajendranath Das — for Respondents.

Pannalal Chatterjee — for Deputy Registrar.

Judgment. — The appellant, hereafter called the Bank, recovered a decree for Rs. 2003-13-3 against Barada Charan Dhar on 11th September 1936 which is still outstanding. On 29th March 1939 the Bank presented an application to the learned District Judge, Chittagong, for adjudicating him an insolvent. Two acts of insolvency were alleged : (1) that he had executed a deed of gift in favour of his wife with the intent of defeating and delaying his creditors, and (2) that he had suspended payment of his debts and had given notice thereof to his creditors. The date of the deed of gift was given as 21st February 1939. The learned District Judge refused to adjudicate him insolvent. He held that the evidence led by the petitioning creditor was not sufficient to establish the second act of insolvency alleged in the petition. Before him the parties admitted that Barada had executed the deed of gift in favour of his wife on 30th October 1938 and that deed had been registered on 21st February 1939. On the

admission that the deed had been executed on 30th October 1938 he took up the question of law as to whether the alleged first act of insolvency was available to the petitioning creditor in view of the provisions of sub-s. (1) (c) of S. 9, Provincial Insolvency Act. He held that the transfer must be taken to have been made on 30th October 1938, when the deed was executed, and not on 21st February 1939 when it was registered. In that view he held that the said act of insolvency was not available to the petitioning creditor as he had presented his petition beyond three months from the date of the said alleged act of insolvency. As the point of law was taken up as a preliminary point and was answered against the petitioning creditor, the evidence bearing upon the point as to whether the gift by Barada to his wife was made with intent of defeating or delaying his creditors was not led. Against the order of the learned District Judge refusing to adjudicate Barada as insolvent the Bank has preferred this appeal. During its pendency Barada died and his legal representatives have been brought on the record as respondents. Three questions arise before us: I. Whether the proceedings for adjudicating Barada as insolvent can continue after his death. II. Whether the evidence is sufficient to uphold a finding that Barada had given notice of suspension of payment to his creditors. III. Whether for the purpose of s. 9 sub-s. (1) cl. (c) the transfer can be taken to have been made on the date of the execution of the deed of gift and its acceptance, or on the date when it was registered.

I. The first point depends upon the effect of S. 17, Provincial Insolvency Act, which provides that notwithstanding the death of the debtor the proceedings would go on, unless the Court otherwise orders so far as may be necessary for realisation and distribution of the property of the debtor. But the matter of realisation and distribution of the property of the debtor cannot be conducted unless there is a person in whom the property is vested, and the property of the debtor would vest in the receiver only on adjudication. Section 17 therefore by necessary implication authorises the Court to pass an adjudication order even after the death of the debtor. The view we are taking is supported by the decisions in 51 Mad. 495¹ and 34 C. W. N. 445.² The first point is accordingly answered in favour of the appellant.

II. The petitioning creditor examined two

1. ('28) 15 A.I.R. 1928 Mad. 480 : 51 Mad. 495, Ramathai Anni v. Kanniappa Mudaliar.
2. ('30) 17 A.I.R. 1930 Cal. 590 : 34 C. W. N. 445, Ramesh Chandra v. Charu Chandra.

witnesses, Sukhendu Mohan Sen and Upendralal Dass. The first witness is a clerk of the petitioning creditor, and the second the law clerk of the Eastern Union Bank, another creditor of Barada. They say that in February and March 1939 respectively they went to Barada for *tagid* but Barada replied that he was not at the time able to pay them. This evidence in our judgment is not sufficient to bring the case within cl. (g) of S. 6, Provincial Insolvency Act. The notice of suspension must be for the whole of the indebtedness. It must amount to an expression of a general intention to stop payment to every creditor. If the petitioning creditor and the Eastern Union Bank were the only creditors of Barada the conclusion from that evidence may have been otherwise, but there is no evidence that they were the only creditors of Barada. The evidence does not disclose any circumstance which taken along with those statements of Barada would have reasonably created in the mind of a creditor that Barada was giving notice to all his creditors that he had suspended or was about to suspend payment of his debts. The second point is accordingly answered against the appellant.

III. The third point raises a question of considerable importance. There is no direct authority of this Court on the point, which relates to the construction of S. 6 cl. (b) taken with S. 9, sub-s. (1), cl. (c), Provincial Insolvency Act. Broadly speaking the point is whether the starting point of limitation would be the date of the execution of the deed of transfer or the date of its registration, where the law requires a registered instrument. In the case of a gift, the competition would be between the date of acceptance by the donee and the date of registration of the deed of gift. The point has been considered by the Madras, Lahore and Nagpur High Courts. The cases are 58 Mad. 166,³ A. I. R. 1933 Lah. 821,⁴ 16 Lah. 739n,⁵ 16 Lah. 735⁶ and A. I. R. 1934 Nag. 171.⁷ In all these cases, except A. I. R. 1933 Lah. 821,⁴ the view was expressed that the date of the registration is the material date. A. I. R. 1933 Lah. 821⁴ was expressly overruled by the Full Bench of the Lahore High Court. An analogous question which arose in connexion with S. 54, Provincial Insolvency Act, has been considered in this

3. ('34) 21 A. I. R. 1934 Mad. 637 : 58 Mad. 166, Iswarayya v. K. Subbanna.

4. ('33) 20 A. I. R. 1933 Lah. 821, Ratan Chand v. Smail.

5. ('35) 16 Lah. 739n, Devi Das v. Moti Ram.

6. ('35) 22 A. I. R. 1935 Lah. 565 : 16 Lah. 735 (F.B.), Lakhmi Chand v. Kesho Ram.

7. ('34) 21 A. I. R. 1934 Nag. 171, Kanhaiyalal v. Sadasiv Rao Ganpat Rao.

Court and in the Madras and Rangoon High Courts. The Madras High Court has held in 64 M. L. J. 382=A. I. R. 1933 Mad. 185⁸ that the date of registration is the material date. That view was adopted by a Division Bench of the Rangoon High Court in 12 Rang. 263,⁹ but a Full Bench of that Court has overruled that decision and has held that the date of the execution is the material date: A.I.R. 1937 Rang. 446.¹⁰ In A. I. R. 1937 Rang. 446¹⁰ one of the Judges, however, remarked that different considerations may arise in considering limitation with regard to S. 9 (1) (c), Provincial Insolvency Act. A Division Bench of this Court has taken the view that for the purpose of S. 54 the date of the execution of the deed and not the date of its registration is the material date: I.L.R. (1938) 2 Cal. 275.¹¹ As the last mentioned case concerned S. 54, Provincial Insolvency Act, it is not necessary for us formally to dissent from it and refer the question before us which concerns Ss. 6 (b) and 9 (1) (c) to a Full Bench. We do not, however, express our concurrence with the reasons given therein, though we agree that some distinction may be made between the considerations material to questions falling for decision under S. 6 (b) read with S. 9 (1) (c) and under S. 54, Provincial Insolvency Act.

The Registration Act affects documents and not transactions. When a transfer deed coming within S. 17 of that Act is executed, it has to be registered and if not registered the written instrument would be affected by S. 49 of the Act. If an oral transfer is permitted by law, and property is transferred without a document the transfer would be perfectly valid and would operate from the date when the transfer is effected, which in the case of gift generally would be the date of acceptance by the donee, except in those cases in which the personal law of the donee requires a further act on the part of donor, as for instance delivery of possession in the case of Hindus and Mahomedans. Thus, where a Mahomedan makes an oral gift of immovable property the gift would be operative not from the date when the declaration of gift is made by the donor, nor when the gift is accepted by the donee but from the date when possession is delivered to the donee. In that case the date on which possession was deli-

vered would be the material date for the purpose of S. 9 (1), cl. (c), Provincial Insolvency Act, when that gift is alleged to be the act of insolvency of the donor. Oral evidence of the factum of gift can be given and that evidence would not be excluded by S. 91, Evidence Act. Sections 17 and 49, Registration Act, would not also come into the picture as there would be no written instrument and no instrument would be required by reason of the saving contained in S. 129, T. P. Act.

In cases of sales and mortgages of immovable property (other than mortgages by deposit of title deeds in those places where such mortgages are allowed), where the consideration is rupees one hundred or upwards, and in cases of gifts of immovable property of whatever value, (except in the cases of Mahomedans) the Transfer of Property Act requires a written instrument and further requires that written instrument to be registered in accordance with the provisions of the Registration Act. Three conclusions follow: (1) that the title would not pass from one to the other if the instrument is not registered and title would not pass till the instrument is registered; (2) that oral evidence to prove the factum of the transfer is not admissible (S. 91, Evidence Act); and (3) the unregistered instrument cannot be taken in for proving the transfer (S. 49, Registration Act). If S. 47, Registration Act had not been in the statute book the result would have been that the transfers in the case of sales and mortgages of immovable property when the consideration was rupees one hundred and upwards and in the case of gifts of immovable properties of any value the material date for the purpose of S. 9 (1) cl. (c), Provincial Insolvency Act, would have been the date of registration, the date when the Registrar or Sub-Registrar of assurances endorsed on the instrument the certificate of registration. The divergence of judicial opinion in cases on S. 6 read with S. 9 (1) (c) as well as on S. 54, Provincial Insolvency Act, which we have noted above, rests upon the effect of S. 47, Registration Act. That section enacts that when the instrument has been registered it would have operation not from the date of its registration but from the date on which it would have commenced to operate if no registration thereof had been required. That date would generally be in the case of sales and mortgages when the instrument was executed and in the case of gifts the date of acceptance by the donee.

Transfer is an event—the performance of a juristic act. A juristic act may be unilateral or bilateral. It is only by a juristic act that title or rights in property pass from one person to another. A mere act or action on the

8. ('33) 20 A.I.R. 1933 Mad. 185 : 64 M. L. J. 382, Muthiah Chettiar v. Official Receiver of Tinnevely District.

9. ('34) 21 A.I.R. 1934 Rang. 216 : 12 Rang. 263, U Ba Sein v. Maung San.

10. ('37) 24 A. I. R. 1937 Rang. 446 (F. B), U On Maung v. Maung Shwe.

11. ('38) 25 A.I.R. 1938 Cal. 417 : I.L.R. (1938) 2 Cal. 275, Rama Nanda Pal v. Pankaj Kumar.

part of a person or persons is not a juristic act. A juristic act is an act in a form prescribed by rules of law. Though the rigid formalities of ancient times—the days of the *aes et libra*—are gone, still in modern law every act of a person is not a juristic act and formalities imposed by law are of the essence of it. The act of signing a will by the testator is the same, whether the will is attested or unattested, but it is only the attestation which makes the act of the testator a juristic act. So in the case of mortgages and gifts of immovable property. The document though signed by the mortgagor or donor and registered would have no effect on the property unless it is attested by two witnesses. It is only when the formalities which must accompany an act, where formalities are required by law, are complied with that the act becomes a juristic act. This is one legal concept. Ordinarily a transfer of rights takes place as soon as the juristic act is performed, and at the moment it is performed. But the Legislature can give retrospective operation to the effect of a juristic act just as it can give retrospective operation to any provision of a statute which affects vested rights. This is another and a different legal concept. Confusion must not be made between the operation of a document and the event. We think that there may have been some confusion of these two ideas in those decisions which relied on S. 47, Registration Act, for holding that the date of execution of the document is the material date. We recognise of course that there is some difference between cases under S. 9 (1) (c) read with S. 6 (b) and under S. 54, Provincial Insolvency Act, and that whereas in matters relating to the former sections the material consideration is the act of insolvency, with which the question of operation of the document will not arise, different considerations may present themselves when considering the date of the transfer for the purpose of avoidance under S. 54 of preferential transfers after adjudication.

The fact that registration can be effected within a longer period than the period mentioned either in S. 9 or S. 54, Insolvency Act, may not be a sound consideration for holding that the starting point of time should be taken to be the date of registration and not the date of the execution of the instrument for the purpose of those sections. As has been pointed out by Roberts C. J. in A. I. R. 1937 Rang. 446,¹⁰ secrecy may still be maintained for a time in spite of registration but we do not see any good reason for substituting for the date of the transfer the date from which the transfer is to come into operation. The reason given by the Full Bench of the Rangoon

High Court that if the date of registration of the instrument of transfer be taken to be the material date, it would not be possible to avoid a transfer under S. 54, Provincial Insolvency Act, where the deed has been executed before the date of the presentation of application for adjudication but registered after that date, does not appeal to us. Keeping in view the distinction between the date of transfer and the date from which the transfer becomes operative—its retrospective operation, if the date of the transfer, i. e., of the completion of the juristic act, be taken to be date of the registration, such a transfer would not require avoidance but would be void on the ground that the insolvent would not be deemed to have the power of completing the juristic act, by the presentation of the document for registration after the presentation of the application for adjudication, for, on adjudication, his property would vest in the receiver as from the date of the presentation of the application for adjudication. (Section 28, sub-s. (7)). Nor do we consider that the decision of the Judicial Committee in 54 I. A. 89,¹² on which the Full Bench of the Rangoon High Court placed reliance, relevant to the question before us, or relevant to the question which was before that Full Bench. The precise effect of that decision of the Judicial Committee of the Privy Council has been explained by a Division Bench of this Court in 62 Cal. 979,¹³ of which one of us was a party. Its effect is that the vendor or the donor has no *locus penitentie* to resile after execution of the deed of sale or after acceptance of the gift by the donee, though the title there is incomplete by reason of the non-registration of the instrument. We accordingly hold that for the purpose of S. 9, sub-s. (1), cl. (c), Provincial Insolvency Act, time is to be reckoned from the date of the registration of the transfer deed, where the Transfer of Property Act requires a registered instrument for the transfer which is alleged to constitute the act of insolvency. As no evidence has been led on the point as to whether Barada had made the gift to his wife with the intent of defeating or delaying his creditors, we remand the case to the lower Court so that parties may have an opportunity to lead evidence on the point. If the Court finds that the gift was made with that intent it would pass an order adjudicating Barada as insolvent. The result is that this appeal is allowed. The order of the learned District Judge dated 17th May 1941

12. ('27) 14 A. I. R. 1927 P. C. 42 : 54 I. A. 89, Kalyanasundaram Pillai v. Karuppa Mooppanor.

13. ('36) 23 A. I. R. 1936 Cal. 17 : 62 Cal. 979, Naresh Chandra v. Gireeshchandra Das.

is set aside and the case is remanded to that Court. The parties would bear their respective costs in this Court.

R.K.

*Appeal allowed.***A. I. R. (31) 1944 Calcutta 374**

LODGE AND ROXBURGH JJ.

*K. H. Bhattacharjee and another
Accused — Petitioners.*

v.

Emperor.

Cri. Revn. Nos. 754 and 755 of 1943, Decided on 23rd May 1944, from order of Addl. Chief Presidency Magistrate, Calcutta.

(a) Penal Code (1860), Ss. 161 and 384 — If offence comes within S. 161, accused can be convicted under it although principal offence be one under S. 384.

Even where the offence is principally an offence under S. 384, that would be no bar to conviction and sentence under S. 161 if the offence came within the definition of that section. [P 376 C 1]

(b) Evidence Act (1872), Ss. 114, illust. (b) and 133—Person paying bribe is accomplice but his position different from accomplice in other offences—No fixed rule for corroboration of accomplice—Court believing his evidence—Conviction is not bad.

No doubt in a sense the person who pays bribe is an accomplice of the person who receives the bribe; but the position is essentially different from that of one dacoit deposing regarding the dacoity against his fellow dacoits. There is no hard and fast rule regarding the corroboration of an accomplice. The Legislature has left the Courts free to act on the uncorroborated testimony of an accomplice if the Courts believe that evidence. [P 376 C 2]

C. H. Carden Noad and Sures Chandra Taluqdar (in 754) and Sudhansu Sekhar Mukherjee (in 755) — for Petitioners.

Amiruddin Ahmad, Deputy Legal Remembrancer — for the Crown.

Lodge J.—The two petitioners were tried by the Additional Chief Presidency Magistrate of Calcutta and were convicted of the offence of bribery. Petitioner 1, K. H. Bhattacharjee was sentenced under S. 161, Penal Code, to undergo rigorous imprisonment for six months. Petitioner 2, Amar Bhattacharjee alias Mantu was sentenced under S. 161/109, Penal Code, to undergo rigorous imprisonment for three months. The two rules have been issued to show cause why the convictions and the sentences should not be set aside. The case for the prosecution briefly is that petitioner, 1 K. H. Bhattacharjee was the personal assistant to the Controller of Inspection, Indian Stores Department, Calcutta Circle, and petitioner 2, Amar Bhattacharjee was a typist in the same office. The complainant Kunja Behary Ghose applied for an appointment in the office of the Indian Stores Department. He was directed to appear for a test and did so. A week after appearing for the test, this witness Kunja Behary Ghose visited the office to ascertain

the result. Petitioner 1 then told him that he would get the information later. About a month later, probably some time in August 1942, Kunja Behary Ghose again saw petitioner 1 to ascertain what was his fate. On this occasion, petitioner 1 showed him two fingers, and explained that he would have to pay two hundred rupees. Kunja Behary Ghose stated that he could not pay so much, and he was directed to go to the village home of petitioner 1, on the following Sunday. Kunja Behary Ghose accordingly visited the village home of petitioner 1 on the following Sunday. He there met petitioner 2, Amar whom he had previously seen in the office. Amar represented himself to be the nephew of petitioner 1. Kunja Behary Ghose was told that petitioner 1 was upstairs. He waited for some time, and saw other people going upstairs apparently to interview petitioner 1. He accordingly spoke to Amar, petitioner 2 and requested him to take him to petitioner 1. Amar did so and on the way upstairs explained to Kunja Behary that he would have to pay the sum of two hundred rupees. Kunja Behary saw petitioner 1 upstairs. Again, he was told by petitioner 1 that he would have to pay two hundred rupees for the job. Ultimately, it was agreed that he should pay one hundred and fifty rupees.

On 21st September 1942, Kunja Behary Ghose again went to the office and saw petitioner 1. He was asked if he had the money with him and he replied that he had not. He was told that he would get the appointment if he produced the money. On the following day, namely, 22nd September 1942, Kunja Behary called at the office with fifty rupees which he had borrowed from one Jiten Ghose who works in the General Electric Company. The fifty rupees were paid to petitioner 2 to be made over to petitioner 1. On that day, Kunja Behary Ghose was given his letter of appointment, and he wrote his joining letter. On a subsequent occasion, Kunja Behary made a second payment of fifty rupees to Amar, petitioner 2 in the presence of petitioner 1, and the money was handed over by the second to petitioner 1. On 6th or 7th October 1942, Kunja Behary was given to understand that if he did not pay the balance of fifty rupees, petitioner 1 would procure his dismissal. Being unable to find the money, Kunja Behary again went to Jiten Ghose at General Electric Company's office, and tried to obtain the money. He told all the circumstances to Jiten Ghose, and the matter was reported to two officers of the General Electric Company. He was advised to inform the police, Kunja Behary then got in touch with Mr. K. N. Mukherjee, Deputy Superintendent

of Police, who had been placed on special duty to investigate cases of bribery. He told the whole story to Mr. K. N. Mukherjee who told him that he would provide him with fifty rupees which he should pay next morning to petitioner 1. In the meantime, Mr. K. N. Mukherjee moved the Chief Presidency Magistrate to provide him with a Magistrate who would be present when the payment was made and to note markings on five ten-rupee notes which would be made over to the recipient of the bribe.

Accordingly, on the following day, Kunja Behary was sent to the office, and Mr. Mukherjee and the Magistrate and another gentleman sat in the outer office. Kunja Behary went into the inner office, handed over the sum of fifty rupees in marked notes, then came out and made a signal that he had made the payment. The police officer, the Magistrate and the witness then hurried into the room and found the marked notes in the possession of petitioner 1. Petitioner 1 there and then made a statement to the effect that Kunja Behary had come to him and said that he owed money to Amar and that he was not able to wait to find Amar, and he had asked petitioner 1 to take this money and make it over to Amar on his behalf. Ten prosecution witnesses were examined. No witnesses were examined for the defence. It is not denied that Kunja Behary was an applicant for a post in the Stores Department in July 1942. It is not denied that he received an appointment in September 1942. It is not denied that he entered the room of petitioner 1 on the date of occurrence, and handed over the sum of fifty rupees in marked notes to petitioner 1. The defence does, however, deny that any money was demanded from Kunja Behary as a reward for getting him the job. The defence does deny that any pressure was put on Kunja Behary to make payment after he succeeded in getting the job. The defence does deny that any money was paid to K. H. Bhattacharjee or Amar either on 22nd September or on 6th October 1942, and denies that fifty rupees were paid to K. H. Bhattacharjee on the day of occurrence as a bribe or as a reward for securing the appointment for Kunja Behary. The learned Magistrate examined the evidence with care and came to the conclusion that the case had been proved satisfactorily, and he convicted both the accused persons.

Revision Case No. 754 of 1943.

Mr. Carden Noad appearing on behalf of Mr. K. H. Bhattacharjee has argued that the case against petitioner 1 really rests on the evidence of Kunja Behary Ghose. He contends that the other evidence in the case does not

prove that any offence was committed by his client. Mr. Carden Noad went further and said that it was proved in the case that Kunja Behary had altered his story in material particulars from time to time, and that therefore Kunja Behary was altogether unreliable. To substantiate this argument, Mr. Carden Noad drew our attention to the statement of Kunja Behary in evidence that petitioner 2 Amar was a nephew of petitioner 1, and he contrasted this with the statement made by Mr. K. N. Mukherjee to the Chief Presidency Magistrate in Ex. 9 when asking that a Magistrate be deputed to witness the payment. He also drew our attention to the facts that in his evidence, Kunja Behary states that during the interview in the village home of petitioner 1, it was agreed that one hundred and fifty rupees would be accepted in place of two hundred rupees as originally demanded, and he contrasted this with the statement made by Mr. K. N. Mukherjee in Ex. 9 that two hundred rupees was always in demand, and with a similar statement in the petition of complaint. The evidence on record shows that the petition of complaint was drawn up by a pleader on instructions from Mr. K. N. Mukherjee. By no stretch of imagination, can it be held that the witness Kunja is responsible for the statements either in the petition of complaint or in Ex. 9. At best, it can be said that Mr. K. N. Mukherjee and the pleader made statements at variance with the statements of Kunja Behary in Court. Their statements were hearsay evidence. The witnesses were not prepared to say definitely that they heard these statements from Kunja Behary, and the fact that the statements made by these witnesses did not agree with the statement of Kunja Behary is no reason, in my opinion, for distrusting the evidence of the latter. Nothing that Mr. Carden Noad was able to point to us justifies us in holding that Kunja Behary Ghose was unreliable.

Mr. Carden Noad next contended that Kunja Behary was an accomplice inasmuch as he was paying a bribe to a Government servant, and that, therefore, his evidence cannot be accepted unless it is corroborated in material particulars both as regards the nature of the crime committed and as regards the persons concerned in that crime. Even if it be conceded that Kunja Behary Ghose was an accomplice, there was ample corroborative evidence so far as petitioner 1 was concerned. Mr. Carden Noad next contended that even if the evidence be accepted as reliable, the offence that his client committed was the offence of extortion punishable under s. 384, Penal Code, and his client ought not to be convicted of an offence punishable under s. 161 of the Code. Mr. Carden

Noad went further and said that as the offence which his client committed was the offence of extortion, sanction under S. 197, Criminal P. C., and consent under S. 270, Government of India Act, 1935, for his prosecution under S. 161 ought not to be relied upon and was insufficient for the prosecution in the present case. In my opinion there is no substance in this contention. Even if we considered that the offence was principally an offence under S. 384, Penal Code, that would be no bar to conviction and sentence under S. 161 of the Code if the offence came within the definition of that section; but in the present case, viewed as a whole, the offence was essentially the offence of bribery. It is true that according to the complainant, the later sums were extorted from him, but the original payment and the original demand were offences punishable under S. 161, Penal Code, and not (probably) offences punishable under S. 384. In my opinion, S. 161, Penal Code, is appropriate in the present case, and there was no error in law in trying the petitioners under S. 161 in preference to trying them for offences under S. 384, Penal Code.

Lastly, Mr. Carden Noad contended that the question whether the accused could be tried under S. 161 in preference to being tried under S. 384, Penal Code, and the question whether the consent accorded under S. 270 (1), Government of India Act, 1935, to his prosecution under S. 161 was a sufficient consent for his prosecution in the present case are all questions involving the interpretation of S. 270, Government of India Act, 1935, and that, therefore, certificate for leave to appeal to the Federal Court ought to be granted. In my opinion, there is no substantial question of law as to the interpretation of any section of the Government of India Act, 1935, involved in the present case, and consequently, there is no justification for the grant of certificate for leave to appeal to the Federal Court. In my opinion, the case against the petitioner K. H. Bhattacharjee was proved to the hilt. I can find no error of law which would justify interference by this Court. In my opinion, the rule obtained by the petitioner, K. H. Bhattacharjee must be discharged.

(*Revn. Case No. 755 of 1943.*) — On behalf of petitioner 2, Amar Bhattacharjee alias Mantu, Mr. Mukherjee has contended that there is no corroboration whatever of Kunja Behary Ghose's evidence as to the complicity of petitioner 2. Mr. Mukherjee has argued that Kunja Behary was an accomplice and must, therefore, be corroborated before his evidence can be acted upon. It is true that there is really no corroboration of the evidence of Kunja Behary so far as petitioner 2,

Amar is concerned. The learned Additional Chief Presidency Magistrate relied upon the statement of petitioner 1 when arrested as corroboration against Amar, but, in my opinion, he was wrong in doing so. The case against petitioner 2 really rests on the uncorroborated testimony of Kunja Behary Ghose. It is true in a sense that the person who pays bribe is an accomplice of the person who receives the bribe; but the position is essentially different from that of, say, one dacoit deposing regarding the dacoity against his fellow dacoits. In the present case, Kunja Behary Ghose was not in danger of prosecution. He had nothing to gain by falsely implicating other accused persons. Though technically an accomplice, he was essentially, as the learned Magistrate has pointed out, a victim.

There is no hard and fast rule regarding the corroboration of an accomplice. The Legislature has left the Courts free to act on the uncorroborated testimony of an accomplice if the Courts believe that evidence. In the present case, I can find no indication that Kunja Behary Ghose could have any motive for falsely implicating petitioner 2, and I can find no reason whatever for distrusting his evidence in so far as it implicates petitioner 2. That his evidence is true in main details is proved by corroboration in other respects. In these circumstances, it seems to me that the Court was justified in acting on the uncorroborated testimony of Kunja Behary Ghose and in convicting Amar Bhattacharjee alias Mantu. In this view the rule obtained by petitioner 2 must be discharged. The result is that both the rules are discharged in toto. The petitioner must forthwith surrender to their bail and serve out the remainder of the sentences of rigorous imprisonment imposed upon them. Certificate for leave to appeal to the Federal Court under S. 205 (1), Government of India Act, 1935, is refused.

Roxburgh J. — I agree.

R.K.

Rules discharged.

A. I. R. (31) 1944 Calcutta 376

HENDERSON J.

Asmatennessa Bibi w/o Ekinali —

Appellant

v.

Karimaddi Bepari and others —

Respondents.

Appeal No. 242 of 1942, Decided on 24th April 1944, from appellate order of Sub-Judge 4th Court, Dacca, D/- 30th May 1942.

Bengal Tenancy Act (8 of 1885), S. 26G — Original mortgagor, occupancy raiyat—His successor though not occupancy raiyat can apply under S. 26G (5).

The term "mortgagor" in S. 26G (5) includes his successors in interest. There is nothing in the wording of sub-s. (5) to suggest that, when the actual mortgagor is an occupancy raiyat, the right to make an application to restore to possession is confined to such of his successors in interest as may happen themselves to be occupancy raiyats. The successor though not an occupancy raiyat, is entitled to make the application. [P 377 C 1, 2]

Jitendra Kumar Sen Gupta — for Appellant.

Priti Bhusan Barman — for Respondents.

Judgment. — This appeal is directed against an order of the Subordinate Judge rejecting an application under S. 26G, Ben. Ten. Act, which was allowed by the Munsif. The appellant purchased the equity of redemption on 28th March 1929 a few days before the Bengal Tenancy Act, 1928, came into force. The language used by the learned Subordinate Judge might suggest that he thought that the transfer was not good even against the original mortgagor or mortgagee. Upon this basis ground No. 3 is taken in the grounds of appeal to this Court. On a perusal of the judgment however, I am satisfied that the learned Judge never intended to lay down any such proposition. He merely meant to say that the appellant was not entitled to the special privileges of this section. The transfer in the appellant's favour was not binding on the landlord. Mr. Barman, therefore, contended that as a result the appellant is not entitled to maintain the present application. His argument is that S. 26G, Ben. Ten. Act, is confined to occupancy raiyats and, as the transfer in favour of the appellant did not bind the landlord, he is not an occupancy raiyat. For this purpose he relied by analogy, as the learned Subordinate Judge did, on the decision of *Edgley J.* in 44 C. W. N. 118.¹ This decision was considered by a Division Bench in 46 C. W. N. 623.² In my judgment those decisions are not apposite to the present matter. I however accept the position that the appellant is not an occupancy raiyat with the result that a mortgage by her would not come within the terms of the section.

In reply Mr. Sen Gupta has contended that, though the original mortgagor must be an occupancy raiyat, the application under sub-s. 5 may be made by any successor in interest to the original mortgagor irrespective of whether he himself is an occupancy raiyat or not. It has been held that the term "mortgagor" in the section includes his successors in interest. I can find nothing in the wording of sub-s. (5) to suggest that, when the actual mortgagor is an occupancy raiyat, the right to make an application to restore to possession

is confined to such of his successors in interest as may happen themselves to be occupancy raiyats. As it is not disputed that the original mortgagor is an occupancy raiyat, I am of the opinion that the appellant was entitled to make the application. The appeal is allowed, the order of the learned Subordinate Judge is set aside and that of the Munsif is restored. I make no order as to costs.

R.K.

Appeal allowed.

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EDGLEY AND BLANK JJ.

Chairman, Municipality Kishoregunj —
Complainant

v.

Radhika Mohan Ghose — *Accused.*

Criminal Ref. No. 14 of 1943, Decided on 18th May 1943.

(a) Bengal Municipal Act (15 of 1932), Ss. 318 and 501 — Prosecution for non-compliance with S. 318 — Prosecution must show that S. 318 was in operation at time of prosecution.

In the case of a prosecution under S. 501 for erecting a building within the municipal area without the requisite permission under S. 318 the prosecution must show that S. 318 was in operation in the municipality of that area at the time when the prosecution was instituted. [P 378 C 1]

(b) Bengal Municipal Act (15 of 1932), S. 312 (1) and (2) and proviso — Special notification under S. 312 (1) and (2) — Necessity.

Where the conditions prescribed by the proviso to S. 312 were operative no special notification under S. 312 (1) and (2) would be required. [P 378 C 1]

Satindra Nath Mukherjee —

In support of Reference.

Chintaharan Roy — In opposition.

Tapendra Kumar Pal — for Complainant.

Edgley J. — In this case the learned Additional District Magistrate of Mymensingh recommends that the acquittal of the opposite party be set aside and that the case in which he was acquitted be ordered for retrial. It appears that the opposite party, Radhika Mohan Ghose, was placed on his trial before an Honorary Magistrate of Kishoregunj in respect of an alleged offence under S. 501, Bengal Municipal Act. The case against him was to the effect that he had erected a building within the municipal area without having obtained the requisite permission under S. 318 of the Act. The learned Magistrate acquitted the opposite party mainly on two grounds, (1) that there was no evidence to the effect that Sch. VI, Bengal Municipal Act, together with Ss. 315, 317 and 329 had been applied by notification to the Kishoregunj Municipality and (2) that, in any case, the prosecution of the opposite party had been sanctioned not by the Commissioners at a meeting as contemplated by S. 332, Bengal Municipal Act, but by the Chairman alone. The learned Addi-

1. (40) 27 A.I.R. 1940 Cal. 6 : 44 C. W. N. 118, *Annada Prosad v. Ramjan.*

2. (42) 29 A.I.R. 1942 Cal. 423 : 46 C. W. N. 623, *Nripendra Chand Saha v. Jowadali.*

tional Magistrate in his letter of reference points out that the reasons given by the learned Magistrate for acquitting the accused are groundless and that, in these circumstances, the acquittal must be regarded as based on a mistake of law. In the first place, the learned Additional Magistrate observes that

“The Municipality by notification exercised the necessary powers under the old Municipal Act and consequently under proviso to S. 312, sub-s. (2) of the new Act continued to exercise those powers, no special notification being necessary.”

In the circumstances of this particular case it was essential for the purpose of the prosecution to show that S. 318, Bengal Municipal Act, was actually in operation in the Kishoregunj Municipality at the time when the prosecution was instituted. According to the view which has been adopted by the learned Additional Magistrate it would appear that, as a matter of record, he was satisfied that the conditions prescribed by the proviso to S. 312, Bengal Municipal Act, were operative, and, if this be a fact, it follows that no special notification under S. 312, sub-ss. (1) and (2) would be required, in this case. It would appear *prima facie* that the proviso to S. 312, Bengal Municipal Act, must have been overlooked by the learned Honorary Magistrate in the trial Court and from this point of view the matter will require further consideration. As regards the second point the learned Additional Magistrate points out that in fact the Commissioners had sanctioned the prosecution at a meeting on 14th March 1942. If this was the case, the requirements of S. 330 (1) (a) read with S. 332, Bengal Municipal Act, were *prima facie* satisfied. We, therefore, accept the Reference for the reasons set forth in the Letter of Reference, dated 2nd February 1943. The order of acquittal dated 6th November 1942 is set aside and it is directed that the case be retried according to law by a stipendiary Magistrate of Kishoregunj to be selected for this purpose by the District Magistrate of Mymensingh. The Reference is accordingly accepted and the rule is made absolute.

Blank J. — I agree.

G.N.

Reference accepted.

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B. K. MUKHERJEA AND ORMOND JJ.

Gobinda Chandra Banik — Plaintiff
— Appellant

v.

Swarnamayi Rudrapal w/o Nadi Rudrapal and others — Defendants —
Respondents.

Appeal No. 663 of 1939, Decided on 13th June 1944, from appellate decree of Dist. Judge, Sylhet, D/- 30th June 1938.

Assam Local Rates Regulation (3 of 1879), Ss. 3, 7, 30 — Sale for arrears—What passes to purchaser explained.

There are no provisions in the Assam Law corresponding to those contained in the Public Demands Recovery Act in Bengal and for non-payment of arrears of local rates, the only procedure that is followed is to put up the property to sale. By property is meant an estate which bears Government revenue and the owner of which is liable to pay local rates as an additional imposition. On such sale the purchaser cannot have any higher right than what the sale certificate itself purports to convey. When the sale certificate shows that only a separate account was put to sale, the purchaser cannot claim anything more than what was actually exposed for sale. [P 380 C 1]

Dr. Sen Gupta and Satyendra Kishore Ghose —
for Appellant.

Hemendra Kumar Das, Ajit Kumar Dutta and
Md. Asir for Abdul Quasim (for Deputy
Registrar) — for Respondents.

B. K. Mukherjea J. — This appeal is on behalf of the plaintiff and it arises out of a suit commenced by him to recover khas possession of a 5-anna share of the lands described in the schedule to the plaint on establishment of his patni rights to the same. The material facts are not in controversy and may be shortly stated as follows: The plaintiff's case is that the lands in dispute which are situated in mauzas Rajiura and Barabari appertain to a revenue paying estate known as Taluk Haidar Hasan bearing No. 56507/2 of the Sylhet Collectorate. There was a separate account (being separate account No. 1) opened in respect of a 5-anna share of the taluk in the name of Ram Kumar Deb sometime in the year 1880. This separate account was sold for non-payment of revenue as well as of local rates on 24th September 1923 and it was purchased by one Abdul Sattar, who is pro forma defendant 118 in this suit. In September 1927, Abdul Sattar sold his share in the lands of eight mauzas comprised in Taluk Haidar Hasan to Kifatulla and in March 1928, Kifatulla granted a patni settlement of the lands of two out of these eight mauzas, namely, mauzas Rajiura and Barabari to the present plaintiff. The plaintiff avers that the plots described in the schedule to the plaint numbering 133 in all of which plots Nos. 1 to 126 are situated in mauza Rajiura and the rest in mauza Barabari appertain to the Taluk Haidar Hasan and are included in his patni grant. As the defendants kept him out of possession of these properties the present suit was instituted. There were as many as 137 defendants in the suit including the pro forma defendants 118 and 119, but the suit was contested mainly by defendant 67 and many of the remaining defendants claimed tenancy rights under her. We are not concerned with the various pleas taken in the written statement of defendant 67 for our present purposes. The only defence which is material for

purposes of this appeal is that the majority of the lands in suit do not belong to Taluk Haidar Hasan but really appertain to five other taluks or tenures which belong to defendant 67. These other taluks are taluks Numbers 66508/2, 56509/3, 56506/1, 56534/13 and 56653/81 (Taluk Abchand Bibi).

The trial Court on a consideration of the entire evidence gave the plaintiff a part decree. His claim was allowed with regard to all the seven plots which are situated in mauza Barabari and he was declared entitled to recover possession of the same. With regard to the 126 plots of mauza Rajiura the plaintiff's title was declared in respect of 9 plots only, to wit, plots Nos. 3, 20, 21, 86, 87, 98, 105, 106 and 119, and he was given a decree for khas possession of all these plots with the exception of plot No. 119 with regard to which defendant 11 was held to have a protected interest. The plaintiff took an appeal against this decision to the Court of the District Judge of Sylhet. The learned District Judge affirmed the decision of the Court below with slight variations. The plaintiff was given a decree with regard to one other additional plot, namely, plot No. 102 and it was further directed by the appellate Court that the compromise entered into between the plaintiff and some of the other defendants which was not recorded by the trial Judge should form part of the decree. Subject to these modifications the appeal was dismissed. It is against this judgment of the District Judge of Sylhet that the present second appeal has been preferred by the plaintiff.

It may be stated at the outset that the plaintiff relied mainly, if not entirely, upon the thakbust map and statement for the purpose of proving that the disputed lands appertained to Taluk Haidar Hasan. The thak was relaid by a pleader commissioner and his report is that with the exception of plot No. 34 all the remaining plots do appertain to the thak chaks of Taluk Haidar Hasan. The District Judge has subjected the thak map and the thak records to a most critical examination and his conclusion is that in this particular case whatever presumptive value could attach to the thak papers has been amply rebutted by a mass of evidence that has been adduced on the side of the defendants. The evidence on the defendants' side included inter alia a number of chittas (Ex. A series) and kobalas (Ex. K series) showing that the lands were dealt with and possessed as parts of the other taluk, a potta (Ex. H2) granted to Abchand Bibi, the mauzawari register (Ex. M) and certain judgments and decrees (Exs. O and Q series) in two suits brought by Ram Kumar Deb, the original owner of

Separate Account No. 1 and another person against Bishnu Prosad Choudhury husband of defendant 67.

Dr. Sen Gupta, who appeared in support of the appeal, has raised the following points for our consideration : He has contended in the first place that the learned District Judge erred in law in not attaching due weight to the thak survey and map and the considerations which induced him to ignore their presumptive value are legally unsound and unwarrantable. It is contended in the second place that most of the documents upon which reliance has been placed by defendant 67 in support of her case were not duly proved in accordance with the requirements of law and were improperly received as evidence. The third ground taken is that as the lands in suit were sold not merely for arrears of revenue but for arrears of local rates as well under the Local Rates Regulation all the lands which were assessed to these local rates would pass by the sale irrespective of the fact as to whether they appertained to taluk Haidar Hasan or not. It is argued in the next place that the learned District Judge should have, on his findings, given the plaintiff a decree with respect to those portions of plots Nos. 120 to 122 which were found to be within the thak by the pleader commissioner and with regard to which defendant 133 failed to establish his title. The last ground taken is that there should have been a decree for khas possession as against defendant 11 in respect of plot No. 119 inasmuch as there were no materials on the record upon which the learned Judge could come to the conclusion that the sepatni interest of defendant 11 was a protected interest within the meaning of S. 71, Assam Land Revenue Regulation. (After overruling the first two contentions his Lordship proceeded to consider the third contention). We now come to the third point put forward by Dr. Sen Gupta and his argument is that even if the lands in suit do not appertain to taluk Haidar Hasan they were certainly assessed to local rates under the Local Rates Regulation and consequently did pass to the auction purchaser when the sale was not on account of default in the payment of revenue alone but for non-payment of arrears of local rates as well. This contention, though plausible at first sight does not seem to us to be at all of any substance. In our opinion, Mr. Das is right in his contention that the local rates are an additional liability imposed upon the landholder who owns an estate according to the Assam Land Revenue Manual, and what is put up to sale for non-payment of local rates is the estate itself which is saddled with the payment of Government

revenue. Section 3, Local Rates Regulation lays down that all land shall be liable to the payment of such rates in addition to land revenue and local cesses, if any, assessed thereon, as the Chief Commissioner from time to time directs. Land, according to S. 2 means land which is or but for some express exemption would be assessable to land revenue. Section 7 shows that the landholder is required to furnish information previous to the assessment of local rates. There are no provisions in the Assam Law corresponding to those contained in the Public Demands Recovery Act in Bengal and for non-payment of arrears of local rates, the only procedure that is followed is to put up the property itself to sale and we think that it is perfectly clear that by property is meant an estate which bears Government revenue and the owner of which is liable to pay local rates as an additional imposition. We think further that it will not be necessary to enter into a detailed discussion regarding this matter. The purchaser at a sale for non-payment of revenue or of local rates cannot have any higher right than what the sale certificate itself purports to convey. We find from the sale certificate that only separate account No. 1 of taluk Haidar Hasan was put up to sale and even if we assume that the other lands which were not included in this taluk were also assessed to local rates the purchaser, as we have said above, cannot claim anything more than what was actually exposed for sale. We cannot therefore accede to this contention of Dr. Sen Gupta.

Now, so far as the fourth point is concerned, it is true that some insignificant portions of plots Nos. 120 to 122 were held to be within the thak by the pleader commissioner. Defendant 67 does not lay any claim to these plots and it was claimed by defendant 133 as appertaining to his tenancy under other talukdars. The District Judge says that his document of title was not relaid but having regard to the small fraction of land which is the subject-matter of dispute and relying on the evidence of possession he did not think it worthwhile to allow this land to the plaintiff. There may be some substance in the contention put forward by Dr. Sen Gupta that unless the document of title set up by defendant 133 is properly relaid and the land is held definitely to be included within it there could be no objection whatsoever to the plaintiff's claim which should be allowed to succeed. But there is no difficulty which lies in the way of the plaintiff's claim; although defendant 133 has been made a party to this appeal, yet no such ground with regard to plots Nos. 120 to 122 has been taken in the memo of appeal. As defendant 133 has not appeared, we do

not think it would be right to decide this point in his absence, and for a very minute quantity of land we do not think it proper to set aside the decision of the Court of appeal below on this point.

There remains for us to consider only the last point raised by Dr. Sen Gupta. Now, so far as plot No. 119 is concerned, the District Judge in declaring the title of the plaintiff has dismissed his claim for khas possession on the ground that defendant 11 as a sepatnidar, enjoys a protected interest in this plot under S. 71, Assam Land Revenue Regulation. Now, S. 71 first cl. (b) speaks of an estate or tenure created bona fide and on a rent no less than the full amount of revenue fairly payable in respect of the land and such interest only is protected under that sub-clause. We agree with Dr. Sen Gupta that there are no materials on record which would enable us to say that the requirements of this clause have been complied with. The sepatni rent may be less than the total revenue assessed on the taluk but we have neither the patni potta showing the rent that was reserved by it nor are we in possession of any facts which would go to show the proportionate revenue payable in respect of this land. We think therefore, that this part of the judgment of the Court of appeal below should be set aside. While we affirm the decision of the District Judge on all the other points, we send the case back to him so that this point and this point alone may be reconsidered. The District Judge would, on a consideration of the evidence on the record and on such other and further evidence as he might think fit to allow the parties to adduce, decide this question as to whether defendant 11 has got a protected interest in plot No. 119 within the meaning of S. 71, first cl. (b), Assam Land Revenue Regulation.

The result therefore, is that the appeal is allowed only so far as the decision of the Court below in respect of plot No. 119 is concerned, and is dismissed with regard to all the other points. The judgment of the Court of appeal below is set aside only so far as it concerns plot No. 119 and is affirmed with regard to the rest. The District Judge will consider the question of protected interest with regard to plot No. 119 in the light of the observations made above. The sole heiress of defendant 67 (respondent 54) will be entitled to costs of this appeal.

Ormond J. — I agree.

R.K.

Case remanded.

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HENDERSON J.

Abdul Samad and another — Appellants
v.*Aslam Munshi and others—Respondents.*

Appeal No. 71 of 1942, Decided on 20th March 1944, from appellate order of Dist. Judge, Noakhali, D/- 5th September 1941.

(a) Civil P. C. (1908), S. 47—Question whether execution sale is nullity if comes within S. 47.

As between the judgment-debtor and the decree-holder auction purchaser the question whether the sale held in execution is a nullity comes within section 47. [P 381 C 2]

(b) Limitation Act (1908), Art. 181—Execution sale—Application by judgment-debtor for declaration that sale did not affect his interest is governed by Art. 181.

An application by the judgment-debtor for a declaration that the sale held in execution of the decree against him was a nullity and did not affect his interest is governed by Art. 181. [P 381 C 2]

(c) Civil P. C. (1908), O. 21, R. 90—Execution sale — Some of judgment-debtors proving sale to be nullity — Judgment-debtors if entitled to declaration that sale did not affect their interest.

Where some of the judgment-debtors establish that the sale held in execution of a decree against them was a nullity they are entitled to a declaration that the sale did not affect their interest. The fact that the judgment-debtors refused the decree-holder's offer to allow the sale to be set aside with respect to their share provided that they refunded to him a proportionate share of the purchase-money would not disentitle them to the declaration. [P 381 C 2]

(d) Civil P. C. (1908), O. 21, R. 90—Execution sale not finished on date given in sale proclamation — No formal order of adjournment made — Sale held on next day held irregular and not nullity.

The execution sale was actually held in the course of the monthly sales by the executing Court which had jurisdiction to sell the property. The sales were not finished on 8th June 1936,—the date mentioned in the sale proclamation. No formal order for adjournment was then made. The property, however, was put up to sale the next day. As the decree-holders' bid was not sufficient, a formal order for an adjournment of the sale to the next day was made. The property was then purchased by the decree-holders on 10th June 1936 :

Held that the failure of the executing Court to record a formal order of adjournment from 8th to 9th was nothing more than an irregularity in the exercise of its jurisdiction and did not render the sale a nullity : ('21) 8 A. I. R. 1921 Cal. 597 and 20 I. A. 176 (P. C.), *Rel. on* ; 16 Cal. 794 and ('25) 12 A. I. R. 1925 Cal. 201, *Not foll.* [P 382 C 1]

Obaidul Huq — for Appellants.

Bijan Behari Das Gupta — for Respondents.

Judgment. — This appeal is by the judgment-debtors. The question involved is whether a certain sale held in execution of a decree was a nullity. The sale was held on 10th June 1936, in the course of the monthly sales. They were not finished on 8th June 1936,—the date mentioned in the sale proclamation. No formal order for adjournment was then made, the property, however, was put up

to sale the next day. As the decree-holders' bid was not sufficient, a formal order for an adjournment of the sale to the next day was made. The property was then purchased by the respondents on 10th June 1936. The learned Subordinate Judge dealt with this matter as an irregularity under O. 21, R. 90, Civil P. C.—Indeed, the petition of objection was actually drafted that way. The learned District Judge, however, considered whether the sale was a nullity, but apparently did not appreciate that that was a matter under S. 47, Civil P. C. If the appellants can establish that the sale was a nullity, they are entitled to ask for a declaration that their interest has not been affected thereby. Such an application comes within Art. 181, Limitation Act. The right to make the present application accrued when the dispute about possession arose in 1940. Accordingly, it is not barred by limitation. Mr. Das Gupta asked me to refuse to give the appellants a declaration because of a certain incident which took place in the Court of the Subordinate Judge. He suggested that their refusal of an offer made by the respondents shows that they are mere benamdars of the other judgment-debtors. If the appellants had refused the offer of a declaration limited to their own share leaving the sale intact, it would be beyond dispute that they were the benamdars of the other judgment-debtors. It appears, however, that the respondents offered to allow the sale to be set aside with respect to the share of the appellants provided that they refunded to them a proportionate share of the purchase-money. But if the sale was a nullity there is no reason why the appellants should pay anything. Their refusal of this offer would not, therefore, disentitle them to a declaration.

It is often difficult to draw the line between an irregular sale and a nullity. There has, in fact been a conflict of judicial opinion on the point involved in the present case. The appellants are supported by the decision in 16 Cal. 794¹ and in 40 C. L. J. 311.² No reasons have been given in the judgment for the latter decision. Mr. Das Gupta sought to distinguish the former on the ground that in that case the sale was held too soon. No doubt, if it is a matter of irregularity, the judgment-debtors would be able to show injury more easily when the sale is held before the date notified in the sale proclamation than when it is held after. But if a sale held on a wrong day is a nullity, I cannot see any difference whether it is held too soon or too late. I can find no substance

1. ('92) 16 Cal. 794, *Basharutulla v. Uma Churn Dutt.*

2. ('25) 12 A. I. R. 1925 Cal. 201 ; 40 C. L. J. 311, *Motahar Hossain v. Mohammad Yakub.*

in this attempt to distinguish that decision. The respondents, on the other hand, are supported by the decision in 35 C. L. J. 140.³ The decision of their Lordships of the Judicial Committee in 20 I. A. 176⁴ is to the same effect and is therefore conclusive. As the matter was fully argued I will set out my own conclusion. There can be no doubt that the learned Subordinate Judge had jurisdiction to sell the property. The sale was actually held in the course of the monthly sales. His failure to record a formal order of adjournment from the 8th to the 9th was nothing more than an irregularity in the exercise of his jurisdiction. It is far less serious than an omission to serve a notice under O. 21, R. 22 which is itself nothing more than an irregularity in the execution proceedings. The appeal is, accordingly, dismissed. I make no order as to costs. The alternative application relates to the dismissal of the appellants' application under O. 21, R. 90, Civil P. C. There is nothing which would justify my interference in revision. The application is accordingly rejected.

G.N.

Order accordingly.

3. ('21) 8 A. I. R. 1921 Cal. 597 : 35 C. L. J. 140, Hari Sadhan Roy v. Shib Gopal Mitra.

4. ('93) 20 I. A. 176 (P. C.), Tasadduk Rasul Khan v. Ahmad Hussain.

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EDGLEY AND ROXBURGH JJ.

Bhowani Mohan Joarder

Accused — Petitioner

v.

Emperor.

Criminal Revn. No. 22 of 1943, Decided on 8th April 1943.

Criminal P. C. (1898), Ss. 480, 486 (2) and 413 — Sentence of fine of Rs. 10 under S. 480 — No appeal lies.

Where a sentence of fine of Rs. 10 has been imposed under S. 480 by the Sub-divisional Magistrate having first class powers, no appeal lies against such a sentence in view of the provisions of S. 413. The provisions of S. 413 have application to the appeal in view of the provisions of S. 486 (2) of the Code.

[P 383 C 1]

Dinesh Chandra Roy — for Petitioner.

Amiruddin Ahmad — for the Crown.

Roxburgh J. — This rule arises out of an order of the Sub-divisional Magistrate, Sadar, District Pabna, fining the petitioner the sum of Rupees 10 and sentencing him in default to simple imprisonment for one week under the provisions of S. 480, Criminal P. C., for a contempt of his Court. The facts are briefly that the petitioner, who is a muktear, was arguing a certain matter relating to the forfeiture of a bond when it was pointed out that he had not filed any muktearnama and therefore could not appear. The muktear

interrupted and insulted the Court by saying that this would be seen in a higher Court. The Magistrate thereupon drew up proceedings and passed the order above mentioned. An appeal was lodged before the Sessions Judge of Pabna who held that no appeal lay. The main point pressed before us is that the order of the learned Sessions Judge is incorrect in holding that no appeal lay. The matter turns on the interpretation to be given to S. 486, Criminal P. C. Clause (1) of this section provides that any person sentenced by any Court under S. 480 may appeal to the Court to which decrees or orders made in such Court are ordinarily appealable. Clause (2) of the section provides that :

"The provisions of Chap. 31 shall, so far as they are applicable, apply to appeals under this section, and the appellate Court may alter or reverse the finding or reduce or reverse the sentence appealed against."

The provisions of S. 480 apply to all civil, criminal or revenue Courts and the Code in giving a right of appeal from such varied classes of Courts had to provide to which Courts appeals should lie and this is done in cl. (1) of S. 486. It is contended on behalf of the petitioner that the effect of cl. (1) is to give absolutely a right of appeal in all cases and that then cl. (2) is to be interpreted as applying only the general provisions of the Code relating to appeals contained in Chap. 31 to such appeals when heard, but that the provisions of S. 413 contained in Chapter 31 which limit appeals in certain cases will not be applicable. The question is whether the terms of cl. (1) are to prevail over those of cl. (2) or vice versa. On the whole, the matter is not free from difficulty but we are of opinion that there is no reason to cut down the plain meaning of the terms of cl. (2) though the result of failure to do so may in some respects be anomalous. Clause (1) provides for the Courts to which appeals will lie and cl. (2) will apply all the provisions of Chap. 31 to those appeals when made; there is no reason to cut out the provisions of S. 413 contained in Chap. 31. The Legislature has on this interpretation not made any special provision limiting the right of appeal when the order under S. 480 is passed, for instance by a District Judge or by any Presidency Magistrate or by other Courts exercising the powers under S. 480, although there is a clear provision in S. 413 limiting the right of appeal where an order is passed by a Court of Session, District Magistrate or other Magistrate of the first class, but there seems to be no reason not to give effect to the literal provisions of the section.

The point raised is one which appears never to have been discussed before in any

reported case. There are some cases dealing with the sentence of a fine imposed under S. 480 in which there had been appeals, but in none of them was the present point taken that no appeal lay. In the present case a sentence of fine of Rs. 10 was imposed by the Sub-divisional Magistrate having first class powers. No appeal lies against such a sentence in view of the provisions of S. 413 of the Code and the provisions of that section have application to the appeal in view of the provisions of S. 486 (2) of the Code. The result is that the order of the learned Sessions Judge in this case is in our opinion a correct order. We have been asked, however, to interfere in any case on the merits treating this as a matter of revision from the order of the Magistrate. In our opinion, there is no reason to suppose that the learned Magistrate was not correct in his view that the remark of the muktear was made with a deliberate intention to insult, and in the circumstances there is nothing excessive in the fine imposed. We, therefore, see no reason to interfere. The result is that the rule is discharged.

Edgley J. — I agree.

R.K.

Rule discharged.

A. I. R. (31) 1944 Calcutta 383

HENDERSON J.

Maharaja Sris Chandra Nandi of Kasimbazar—Plaintiff — Appellant

v.

Mahammad Ibrahim Meah Mutwalli to the estate of Naju Meah and others — Defendants—Respondents.

Appeal No. 200 of 1942 with Rule No. 1155 (M) of 1942, Decided on 3rd January 1944, from appellate order of Sub-Judge, Second Court, Chittagong, D/- 8th May 1942.

(a) Civil P. C. (1908), O. 41, R. 33 — Suit for contribution against other cosharers on certain basis—Only one defendant contesting suit—Suit decreed as prayed — Appeal by such defendant challenging basis of calculation—Other cosharer defendants are necessary parties.

Where in a suit for contribution by one cosharer against the other cosharers on a certain basis one of the defendants alone contests the suit challenging the basis of calculation of contribution and the suit is decreed by granting the plaintiff contribution as claimed by him and the contesting defendant cosharer appeals from that decree, the remaining cosharer defendants are not only proper parties but are necessary parties to the appeal. [P 384 C 1]

(b) Civil P. C. (1908), O. 41, R. 22—Cross-objections may be taken even against co-respondent.

Although cross-objection can usually be taken only against an appellant in certain cases such an objection may be taken against a co-respondent. One of the exceptions is when the appeal raises a question which cannot be properly disposed of in the absence of the co-respondent. [P 384 C 2]

Prakash Chandra Pakrasi — for Appellant.

Imam Hossain Chowdhury — for Respondents.

Judgment.—This appeal is by the plaintiff. It arises in connection with a suit for contribution. The appellant deposited the arrears of revenue due on a certain Noabad Taluk in order to save it from being sold. He claimed contribution on the basis of the shares owned by himself and the various defendants. The calculation upon which the claim was based was set out in a statement attached to the plaint. There was a further prayer (Ga) to the effect that, if any modification became necessary, the suit might be decreed in accordance with the findings of the Court. The suit was contested by defendant 1 alone. He neither admitted nor denied the share which was attributed to him in the plaint. His case was that contribution should be levied not on the basis of the shares of the parties but upon the assets of the last settlement. Prima facie it is not very easy to see what this means. His case, however, purported to be based upon the decision of this Court in 15 C. L. J. 191.¹ From the judgments of the Courts below it appears that his contention is that the assets of the plots in the possession of the various co-sharers at the time of the last settlement should be estimated and the liability of each cosharer for the revenue should be in proportion to those assets. The Munsif gave the plaintiff a decree as claimed. Defendant 1 appealed. The Subordinate Judge accepted his contention and remanded the suit. The terms on which the order of remand was made were as follows :

"The suit is sent back to the learned trial Court. The defendant appellant shall produce all the relevant khatians in which the lands of the Noabad taluk have been recorded within such time as may be fixed by the learned Court below and the learned Munsif shall assess the assets in the share of defendant 1 according to the principle which was the basis of fixing the revenue. He shall determine the assets of all the lands in the khas possession of their under-tenants of any degree according to the valuation detailed in Ex. F. The liability of defendants 1 to 9 shall bear the same ratio to the total liability of the taluk as the assets in the share of defendants 1 to 9 thus determined bear to the assets of the entire taluk mentioned in Ex. F. The judgment and decree as against the non-appearing defendants shall stand."

Mr. Chowdhury appearing on behalf of the respondent (defendant 1) did not attempt to support the form of this order. There was no prayer by either party for adducing further evidence. The only explanation of the order is that the learned Judge was acting under the provisions of O. 41, R. 27 (b), Civil P. C. Though he did not record his reasons, on the view which he took, further evidence was undoubtedly necessary. There was, however, no

1. ('12) 15 C. L. J. 191, Lalmohan Thakur v. Nanda Lal.

necessity for a remand. The learned Judge should have disposed of the matter himself. Furthermore, the entries in the khatians are merely presumed to be correct, and that presumption could be rebutted. It would, therefore, only be fair that both sides should be given an opportunity to bring such further evidence as they considered necessary. The practical question therefore is whether the lower appellate Court should be directed to proceed further in the matter or whether the decree of the Munsif should be restored. Two main points have been taken in support of the appeal: (1) that the view of the learned Munsif on the point in controversy between the parties is correct, and (2) that the appeal in the lower appellate Court is not in proper form on account of defect of parties. The dispute on the merits raises an important point with regard to the meaning and effect of the decision on which the respondent relies: but inasmuch as in my opinion the appeal succeeds on the other ground it is not necessary to decide it. As there is nothing to show that the other defendants were aware of this contention or what view they would have taken, if they had been so aware, I shall leave the matter open.

The other defendants did not dispute the plaintiff's method of calculation. The decree has been made against them on that basis and they have not appealed. If the present appeal succeeds there will be an inconsistent decree. There is, therefore, no question that they were proper parties to the appeal and, if an application had been made by the appellant to make them respondents in the lower appellate Court, it would have been bound to succeed. As however, no such application was made, it is now necessary to consider whether they were necessary parties or, if they were not, whether the appellant should be given an opportunity to have them made parties. In my judgment they were necessary parties. The learned Subordinate Judge overruled the appellant's contention on the ground that in a suit for contribution the decree has to be executed against each defendant or set of defendants separately. Hence the decree against the other defendants will not be affected by any modification made on appeal in the decree against defendant 1. This is precisely the reason why they are necessary parties. The point of view taken by the learned Subordinate Judge ignores the real substance of the matter. In the lower appellate Court defendant 1 as appellant should be regarded as though he were a plaintiff in order to see whether he can obtain the relief claimed in the absence of the other defendants. On this point of view, it is necessary to examine the

plaintiff's case made in the plaint. I have already set out the alternative reliefs which he prayed for. As he was satisfied with the decree made by the Munsif there was no reason why he should have appealed or filed a cross-objection against defendant 1. As soon however as defendant 1 appeals, it may become necessary for the plaintiff to press his alternative case in para. (Ga) against the other defendants.

Although the view generally taken in this Court is that a cross-objection can usually be taken only against an appellant, it has been recognised that in certain cases such an objection may be taken against a co-respondent. One of the exceptions is when the appeal raises a question which cannot be properly disposed of in the absence of the co-respondents. The present case is exactly of that nature. If the appeal succeeds, the basis of the calculation on which the decree against the other defendants has been passed ought to be altered. This can only be done by filing a cross-objection: but unless the other defendants are brought on the record the plaintiff is not in a position to press it. Then in the second place, if an inconsistent decree is allowed to be passed difficulties will certainly arise in the future; for example, if defendant 10 makes a deposit and then sues the plaintiff and the other defendants for contribution, apart from anything else, difficult questions of *res judicata* will arise. I am, therefore, of opinion that defendant 1 cannot get any relief in the lower appellate Court in the absence of the other defendants. The order of the lower appellate Court must, therefore, be set aside and that of the Munsif restored. Defendant 1 will pay the costs of the plaintiff in the lower appellate Court and in this Court — hearing-fee two gold mohurs. The question of the basis on which the contribution is to be calculated will be left open. No order is necessary on the rule.

K.S.

*Order set aside.***A. I. R. (31) 1944 Calcutta 384**

HENDERSON J.

*Uday Chand Mahatab Bahadur of
Burdwan — Decree-holder —
Appellant*

v.

*Phanindra Lal Ghosh, Judgment-debtor
and another — Respondents.*

Appeal No. 5 of 1942, Decided on 7th April 1943,
from appellate order of District Judge, Birbhoom,
D-/ 22nd July 1941.

(a) Bengal Tenancy Act (8 of 1885, as amended
by Act 18 of 1940), S. 168A—Property attached
before but sold after amending Act — No appli-
cation by judgment-debtor under S. 168A (2)
before sale—Sale is valid.

Where in execution of a decree property was actually attached before but was sold after the amending Act came into force, the case comes within S. 168A (2). But when no application was made by the judgment-debtor under S. 168A (2) before the sale and the property remained under attachment when it was sold the sale of the property in execution of the decree is valid and cannot be set aside.

[P 385 C 1]

(b) Bengal Tenancy Act (8 of 1885 as amended by Act 18 of 1940), S. 168A—Application under, by judgment-debtor to set aside sale comes within S. 47, Civil P. C. — Appeal lies.

An application by the judgment-debtor to set aside a sale under S. 168A, Ben. Ten. Act, falls under S. 47, Civil P. C., and an order made on that application is appealable as a decree.

[P 385 C 1]

Purusottam Chatterjee — for Appellant.

Judgment.—This appeal is by the decree-holder, and raises a question with regard to the interpretation of S. 168A, Ben. Ten. Act. The sale was held on 22nd February 1941. The new section came into force on 9th January 1941. The judgment-debtor filed an application asking that the sale be set aside on the ground that it was a nullity in view of the provisions of the new section. This application succeeded. The decree-holder appealed. The learned District Judge dismissed the appeal both on the merits and on the ground that it was incompetent. I am bound to say that I do not understand how it could be held that the appeal was incompetent. The application of the respondent was made under the provisions of S. 47, Civil P. C. The order made by the Munsif was appealable as a decree.

The question involves the application of sub-s. (2) of S. 168A. The execution case was filed on 16th December 1940. The order for attachment was made on 17th December 1940 and the attachment was actually effected on 29th December 1940. The new Act came into force on 9th January 1941 and the sale was held on 22nd February 1941. The case comes within the terms of sub-s. (2). That subsection provides that on the application of the judgment-debtor the Court shall direct that on payment by the judgment-debtor of the costs of the attachment, the property so attached shall be released. In the present case no such application was made by the judgment-debtor and the property was therefore under attachment when it was sold. As long as the attachment remained in force, the property was liable to be sold in execution of the decretal dues. The appeal is accordingly allowed, the orders of the Courts below are set aside and the objection filed by the judgment-debtor respondent is dismissed. Respondent 1 will pay the costs of the appellant in the Munsif's Court and in the lower appellate Court. As he has not appeared here, I make no order as to costs in this Court.

G.N.

Appeal allowed.

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B. K. MUKHERJEE AND SHARPE JJ.

Kailash Chandra v. Nanda Kumar.

Civil Rule No. 1221 of 1943, Decided on 20th March 1944.

(a) Succession Act (1925), S. 263—Application for revocation of probate dismissed — Fresh application whether not barred.

The order dismissing an application for revocation of probate was made in the absence of both parties and nothing was heard or decided :

Held that at best the order of dismissal could be regarded as one made under O. 9, R. 3 read with S. 141, Civil P. C., and it could not bar a second proceeding.

[P 386 C 1]

(b) Succession Act (1925), S. 265—District Delegate cannot decide application for revocation of probate.

An application for revocation of a probate being a contentious matter, the District Delegate cannot decide it. He should return such application for being presented to the Court of the District Judge. [P 387 C 1]

(c) Succession Act (1925), S. 263—Application to revoke probate—Remedy is not by suit but by application under S. 263.

The judgment of a Court of probate is a judgment in rem and binds all the world. The judgment in a civil suit is operative only between the parties to the suit. A judgment in rem cannot be revoked or set aside by a judgment which is only conclusive inter partes. Therefore, even when there is allegation of forgery, the proper remedy of the party who wants revocation of a grant of probate, is to apply to the Probate Court under S. 263 and not to file a civil suit: *Case law discussed.*

[P 388 C 1]

(d) Civil P. C. (1908), S. 35—Scope.

As the petitioner who was successful did not raise the question of jurisdiction in the Court below each party was ordered to bear his own costs in the High Court as well as in the Court below.

[P 388 C 1]

Sris Chandra Dutta and Amiya Kumar Mukherjee — for Petitioner.

Jitendra Nath Guha — for Opposite Party.

Order. — This rule is directed against an order of the District Delegate of Bagerhat, in the District of Khulna, dated 8th June 1943, rejecting an application of the petitioner for revocation of a probate, under S. 263, Succession Act. The facts so far as they are material for our present purposes may be stated as follows: The opposite parties are executors under the will of one Prokash Chandra Mandal applied for and obtained ex parte a grant of probate of the said will from the District Delegate at Bagerhat. The grant was made on 2nd February 1938 and on 22nd December 1938, the petitioner, who is a brother of the deceased and but for the will would have inherited half of the estate left by him, presented an application before the same District Delegate for revocation of the grant, on grounds inter alia that no citation was issued on him and that the will of which probate was obtained was a forged will. Before the opposite party received any notice of this proceeding, the application was dismissed in the absence of the petitioner on 14th January 1934. The order recorded by the

District Delegate stands as follows :

"The pleader of the petitioner called for but not found. It seems to me that the applicant should proceed by a regular suit. The application is therefore summarily rejected."

The petitioner thereupon filed a suit in the ordinary way in the Court of the Munsif at Bagerhat, for setting aside the ex parte grant of probate. The Munsif returned the plaint on the ground, that the value of the subject-matter of the suit was beyond his pecuniary jurisdiction. The petitioner says that he was then advised by his pleader, that his proper remedy lay not in a suit, but in an application under S. 263, Succession Act, and accordingly he filed a fresh application for revocation of probate under that section in the Court of the District Delegate at Bagerhat. The allegations were practically the same as in the earlier application, viz., (1) that the grant was obtained by suppression of processes and no citation was issued on the petitioner, and (2) that the will which was probated on the application of the opposite parties was a forged one. The District Delegate by his order dated 8th June 1943, rejected this application. It was held inter alia that the order dismissing the previous application for revocation operated as a bar to the present proceeding, and that as the petitioner came with the allegation that the will itself was forged, his proper remedy was to file a suit in the ordinary way. The District Delegate found on evidence that there was no suppression of processes in the probate proceeding, and notice was in fact served on the petitioners. He however did not investigate the point as to whether the will was forged or not. It is against this order that the present rule has been obtained.

The learned advocate appearing in support of the rule has contended before us that the District Delegate had no jurisdiction to hear an application for revocation of probate and that his duty was to return the application for being presented to the Court of the District Judge. This proposition was controverted by Mr. Guha who appeared on behalf of the opposite parties and he has contended further, that the District Delegate was right in holding that the proper remedy of the petitioner in a case like this was to file a suit. Mr. Guha made no serious attempt to support the decision of the District Delegate on the other point, viz., the order of dismissal in the previous revocation case operated as a bar to the present proceeding, and he conceded further that if the remedy of the petitioner lay in an application and not a suit, it was incumbent upon the District Delegate to investigate the question as to whether the will was a forged one or not. It seems clear to us that the Court below was not right in holding

that the order dismissing the previous application for revocation operated as a bar to the present application on the principle of res judicata. The order was made in the absence of both parties and nothing was heard or decided. At best the order of dismissal could be regarded as one made under O. 9, R. 3 read with S. 141, Civil P. C., and obviously it could not bar a second proceeding. The fact that the Court expressed an opinion regarding the maintainability of the application is in our opinion quite immaterial and does not alter the character of the order that was actually made. The points which really arise for consideration in this rule are two in number, viz., (1) whether the application for revocation in the present case could be heard and decided by the District Delegate and (2) whether the District Delegate was right in holding that as the petitioner sought revocation inter alia on the ground that the will was a forgery his remedy was to file a suit. So far as the first point is concerned, the relevant provisions of law are to be found in Ss. 264 and 265, Succession Act. Section 264, states that

"the District Judge shall have jurisdiction in granting and revoking probate and letters of administration in all cases within his district."

Section 265 then lays down that

"the High Court may appoint such judicial officers within any district as it thinks fit to act for the District Judge as Delegates to grant probate and letters of administration in non-contentious cases, within such local limits as it may prescribe; Provided that, in the case of High Court not established by Royal Charter, such appointment shall not be without the previous sanction of the Local Government."

Thus it is the District Judge that constitutes the probate Court and as such has the jurisdiction in the matter of granting and revoking probate. It is only in non-contentious cases that the power of granting probate and letters of administration can be delegated to the officers appointed under S. 265. Section 288 lays down the procedure that has to be followed by the District Delegate when the proceeding becomes a contentious one. It will be noticed that S. 264 which relates to the powers of the District Judge speaks both of granting and revoking probates and letters of administration whereas S. 265, which deals with District Delegates speaks only of granting probate and letters of administration and says nothing about revocation of grants. It is quite pertinent to argue that this omission is deliberate and that the intention of the Legislature was that the function of revoking grants could not at all be delegated to District Delegates. Mr. Guha argues that the power of revoking probate is implied in that of granting probate, and a Court which made the grant is alone competent to revoke it. Taking this contention to be sound, a revocation proceeding can

be brought within the purview of S. 265, Succession Act only as a part or continuation of the probate proceeding. But the District Delegate is not given any jurisdiction to decide a contentious probate matter and unless a proceeding for revocation of a grant is a non-contentious proceeding the District Delegate could exercise no jurisdiction with regard to it. To us it seems, that an application for revocation of probate is a contentious matter from its very inception, and that is probably the reason why it was not included in S. 265, Succession Act. But even if there is nothing wrong in filing the application for revocation before the District Delegate when the probate was granted by him, we think that the District Delegate is bound to return the petition in accordance with the provision of S. 288, Succession Act, as soon as the other side enters appearance and the proceeding becomes contentious. We cannot accept the argument of Mr. Guha, that whether or not the revocation proceeding is contested, the District Delegate would have jurisdiction to revoke the grant, provided the original probate proceeding was a non-contentious one. This view if accepted would lead to anomalous results and the position would be that the District Delegate would be competent in the revocation case to pronounce a will to be spurious which he could not do in the probate application itself. Our conclusion therefore is that the District Delegate could not, in the present case hear and decide the application for revocation of probate and that the petition ought to have been returned to the petitioner to be presented to the Court of the District Judge.

On the other point we have no hesitation in holding that the Court below was not right in saying that as the petitioner wanted to have the probate revoked on the ground that the will was a forgery his remedy was to file a civil suit, and not an application under S. 263, Succession Act. Section 263, Succession Act, provides that the grant of probate or letters of administration may be revoked or annulled for just cause. The explanation states *inter alia* that just cause exists where "(b) the grant was obtained fraudulently by making a false suggestion or by concealing from the Court something material to the case, or (c) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant". . . Illustration (iii) appended to the section makes it quite clear that forgery of the will is a just cause for revocation.

Thus even when there is allegation of forgery, the proper remedy would be to file an application under S. 263, Succession Act, and that seems to be the exclusive remedy provided by the Act. Of course in all such pro-

ceedings the provisions of the Civil Procedure Code will apply as far as practicable and we may go so far as to say that the proceeding takes the form of a suit (*vide* Ss. 268 and 295, Succession Act), but it is absolutely incorrect to say that the proceeding must be initiated by a plaint, and it will be a suit under the provisions of the Civil Procedure Code. 5 C.W.N. 377¹ is one of the earliest pronouncements on the point and Sale J., held, and, in our opinion, quite rightly that to revoke a grant of probate on the ground of forgery, the proper course is to make an application under S. 50, Probate and Administration Act (corresponding to S. 263, Succession Act). The learned Judge relied in this connection upon the observations of Markby J. in 4 Cal. 360.² Harrington J., however, in a case which came up for decision only a few months after this case was decided: (*vide* 5 C. W. N. 383³) expressed his opinion that the decision in 4 Cal. 360² was no authority for the proposition that a grant of probate cannot be revoked by a regular suit instituted for the purpose.

The learned Judge held indeed, that no other Court other than the Probate Court could revoke the grant, and he seemed to be of opinion that a regular suit for revocation ought to be instituted in the Probate Court itself. This is the solitary authority upon which Mr. Guha based his contention regarding this part of the case. It seems to us that Harrington J. in laying down the law as stated above was influenced to a great extent by the form of plaint, laid down in Form No. 115 (2) in Sch. IV, Part E., Civil P. C., of 1882. That was the form which was to be used by an executor, legatee or next of kin seeking to obtain revocation of probate in cases in which the claim for revocation was filed on the allegation that the will was not the true will of the testator. The learned Judge however did not consider whether that form could be availed of by the litigant, after the Probate and Administration Act came into force. At any rate this form was omitted from the subsequent Code and cannot now be relied upon as throwing any light on this point. On the other hand Banerjee and Stevens JJ. held in a still earlier case 4 C. W. N. 600⁴ that a proceeding instituted for revocation of probate could not be regarded as a regular civil suit. It was a miscellaneous proceeding which did not even attract the operation of S. 83, Probate

1. (1900) 5 C. W. N. 377, In the goods of Mahendra N. Roy.

2. ('79) 4 Cal. 360, Komolochun Dutt v. Nilruttan Mondal.

3. ('01) 5 C. W. N. 383, In the goods of Harendra Krishna Mukherjee.

4. (1900) 4 C. W. N. 600, Pratap Chandra v. Kali Bhanjan.

Act (S. 295 of the present Succession Act). In 12 C. L. J. 91⁵ it was held by Mookherjee and Carnduff JJ. that a proceeding for revocation of a probate was not a suit within the meaning of O. 23, Rr. 1 and 3, Civil P. C. Almost all the relevant decisions on the point have been reviewed by Panckridge J. in I.L.R. (1940) 1 Cal. 14⁶ and it has been held that the High Court in its ordinary original civil jurisdiction cannot entertain a suit for revocation of a grant of probate made in its testamentary jurisdiction on the ground that the will is not a genuine will. We are in entire agreement with the learned Judge when he says, that quite apart from authorities the same conclusion is arrived at if we regard it from the point of view of principle. The judgment of a Court of Probate is a judgment in rem and binds all the world. The judgment in a civil suit is operative only between the parties to the suit. It is difficult to see therefore how a judgment in rem can be revoked or set aside by a judgment which is only conclusive inter partes. In our opinion therefore even when there is allegation of forgery, the proper remedy of the party who wants revocation of a grant of probate, is to apply to the Probate Court under S. 263, Succession Act, and not to file a civil suit. The result therefore is that the rule is made absolute. The order of the Court below is set aside, and the District delegate is directed to return the application for revocation to the petitioner to be presented to the Court of the District Judge. As the petitioner did not raise the question of jurisdiction in the Court below, we direct that each party would bear his own costs in this Court as well as in the Court below.

R.K. *Rule made absolute.*

5. ('10) 12 C. L. J. 91, Sarada Kanta v. Gobinda Mohan.

6. ('40) 27 A.I.R. 1940 Cal. 236 : I.L.R. (1940) 1 Cal. 14, Panna Lal v. Hansraj.

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EDGLEY AND ROXBURGH JJ.

Rabindra Nath Mazumdar

v.

Patiya Urban Co-operative Bank.

Criminal Revn. No. 978 of 1942, Decided on 9th April 1943.

Criminal P. C. (1898), Ss. 222 (2) and 239 (b)—Accused charged with three separate offences under S. 408, Penal Code — Four abettors also charged in respect of three separate abetments — Charge against accused held sufficiently complied with S. 222 (2)—Joint trial of abettors with accused held valid under S. 239 (b).

The accused was charged in respect of three separate offences under S. 408 and the four abettors who were jointly tried with him were also charged in respect of three separate abetments of the aforesaid offences. In the charge against the accused framed under S. 222 (2) the period had been mentioned dur-

ing which the alleged defalcations were made. The gross sum defalcated had not been separately mentioned, but it was quite easy to ascertain the gross total by adding together the totals of the three separate items which had been mentioned. The Magistrate had given more details in the charge than S. 222 (2) expressly required in order to enable the accused to know precisely the case which he had to meet :

Held that the charge as framed substantially complied with the provisions of S. 222 (2). The offence with which the accused was charged must be regarded as one offence within the meaning of S. 222 (2) in spite of the fact that the separate details with regard to several alleged embezzlements on various dates had been mentioned and the four alleged abettors were properly placed on their trial with the principal accused in view of the provisions of S. 239 (b).

[P 389 C 1]

S. C. Talukdar — for Petitioner.

Amiruddin Ahmad — for the Crown.

Edgley J. — This rule arises with reference to the case of a man named Rabindra Nath Mazumdar who was placed on his trial in respect of a charge under S. 408, Penal Code. He was duly convicted and sentenced to undergo a period of rigorous imprisonment for three months and to pay a fine of Rs. 100, in default further rigorous imprisonment for two weeks. The case against him was to the effect that, while he was employed as a temporary clerk of the Patiya Urban Co-operative Bank, he committed criminal breach of trust in respect of certain items of money which totalled Rs. 9-9-9. It may be mentioned that he was jointly tried with four other persons who were accused of abetting the criminal breach of trust which had been committed by the petitioner. In the first place, Mr. Talukdar has argued on behalf of the petitioner that the findings at which the learned Judge has arrived are not sufficient to warrant his conviction. With regard to this point we are of opinion that the findings contained in the judgment of the lower appellate Court are quite sufficient and they amount to findings of fact with regard to all the necessary ingredients of an offence under S. 408, Penal Code. This portion of the learned advocate's argument cannot be accepted.

Mr. Talukdar has, however, argued with some force that the trial of the petitioner was vitiated owing to the fact that his joint trial with the four persons who were accused of abetment was illegal having regard to the provisions of S. 239, Criminal P. C. Mr. Ahmad, on the other hand, contends that the petitioner's trial satisfied all the requirements of the law and, in particular, he places considerable reliance upon the provisions of Ss. 222 and 223, Criminal P. C. In support of his argument Mr. Talukdar contends that, according to the form of the charge, the petitioner was charged in respect of three separate offences under S. 408, Penal Code and that

the four abettors who were jointly tried with him were also charged in respect of three separate abetments. In this connexion, he contends that, even if it be admitted that the petitioner himself was properly charged under S. 408, Penal Code, there is no provision of the Code under which an abettor of the principal offence can be tried jointly with the principal accused in respect of three separate abetments. It is clear from the judgment of the learned Magistrate in the trial Court that he considered that the petitioner had been charged in respect of one offence only having regard to the provisions of S. 222 (2), Criminal P. C. This sub-section reads as follows :

"When the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of S. 234."

In the charge against Rabindra Nath Mazumdar the period has been mentioned during which the alleged defalcations were made. The gross sum defalcated has not been separately mentioned, but it was quite easy to ascertain the gross total by adding together the totals of the three separate items which had been mentioned. It seems to me that the charge as framed substantially complied with the provisions of S. 222, but the learned Magistrate appears to have given more details in the charge than the section expressly required in order to enable the accused to know precisely the case which he had to meet. The procedure which was adopted by the learned Magistrate in this respect was exactly what seems to have been contemplated by the Legislature in S. 223 of the Code which provides that :

"When the nature of the case is such that the particulars mentioned in Ss. 221 and 222 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose."

In this view of the case there can, I think, be no doubt that the offence with which Rabindra Nath Mazumdar was charged must be regarded as one offence within the meaning of S. 222, Criminal P. C., in spite of the fact that the separate details with regard to several alleged embezzlements on various dates had been mentioned. In view of the considerations mentioned above, it would appear that the four alleged abettors were properly placed on their trial with the principal accused in view of the provisions of S. 239 (b), Criminal P. C., the relevant portion of which reads as follows :

"239. The following persons may be charged and

tried together, namely: . . . (b) persons accused of an offence and persons accused of abetment, or of an attempt to commit such offence; . . ."

No question of misjoinder or illegality with regard to the procedure adopted at the trial can therefore arise. We think that the petitioner has been properly convicted and this rule must accordingly be discharged. The petitioner must surrender to his bail and serve out the remaining term of his sentence.

Roxburgh J.—I agree.

G.N.

Rule discharged.

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EDGLEY AND SEN JJ.

Usha Prova Dey v. Hriday Bashini.

Cri. Revn. No. 789 of 1942, Decided on 16th March 1943.

(a) Bengal Patni Taluks Regulation (8 of 1819), S. 15(2)—Proclamation under—Owners of tenures created before patni are not dispossessed—What passes to the purchaser at patni sale stated.

A purchaser at a patni sale gets the patni as it existed at the time of its creation and tenures created prior to the creation of the patni are not affected by the sale. The proclamation issued under S. 15 (2) declares nothing more than this and it cannot be said that merely because a proclamation was issued and steps were taken to give effect to the proclamation the owners of tenures created before the patni were dispossessed. [P 390 C 2; P 391 C 2]

(b) Criminal P. C. (1898), S. 145—Patni sale—Proceeding under S. 145—Court can go into question whether prior tenure-holder continued in possession in spite of proclamation under S. 15 (2) of Bengal Patni Taluks Regulation.

When in proceedings under S. 145 a dispute arises whether or not the purchaser had taken possession of the disputed tenure under the proclamation in terms of S. 15 (2), Bengal Patni Taluks Regulation, it becomes essential for the Magistrate during the course of the proceedings under S. 145, Criminal P. C., to decide this point after finding whether the tenure has been created before or after the date on which the patni itself came into existence and the prior tenure-holder continued in possession. [P 390 C 2]

N. K. Basu and Nalin Chandra Banerjee —

for Petitioner.

S. C. Talukdar and Joy Gopal Ghose —

for Opposite Party.

Edgley J. — This rule arises with reference to a proceeding under S. 145, Criminal P. C., in which a dispute had arisen with regard to some plots of lands in a hat which were claimed by the first party as belonging to certain ganti tenures which had been created before the creation of a patni tenure which was purchased by the petitioner on 15th May 1939. The case for the second party was to the effect that, on 15th May 1939, she had purchased a patni including the disputed land at a patni sale held under the provisions of Patni Taluks Regn. 8 of 1819. According to her case notices annulling all the sub-tenures under the patni were served on 23rd July 1940, but, in spite of these notices, she was not allowed to take peaceful possession of the property which she had purchased. Thereafter, on 5th November 1940, the second party made

an application to the District Judge to the effect that a proclamation might be served under the provisions of S. 15 (2), Patni Taluks Regulation. An enquiry seems to have been held by the learned District Judge at which Anukul Chandra Banerjee, one of the vendors from whom the members of the first party derived their interest was present. His objection seems to have been to the effect that as certain darpatnis were still in existence, the proclamation should not be issued. The learned Judge decided that the darpatnis had ceased to exist and that the petitioner was entitled to the protection which she sought. He therefore ordered that the proclamation should issue. Thereafter, on 13th March 1941 the proclamation was alleged to have been served by a peon of the civil Court, but in spite of this alleged service the second party does not appear to have obtained possession, with the result that, on 18th March 1941, she made a further application to the District Judge for police help in the matter. Her case was to the effect that she obtained possession through the police on 20th March 1941 and remained in possession, at any rate until 31st March 1941 when she was again obstructed, with the result that proceedings had to be instituted under the provisions of S. 145, Criminal P. C.

The findings of the learned Magistrate were to the effect that the first party was in possession of the disputed property, that there was no dependable evidence to show that the second party had ever exercised actual physical possession of the property in dispute and that there was strong evidence to show that there was no break in the continuity of possession of the first party. The learned Magistrate also held that it had been proved beyond reasonable doubt that the first party had collected tolls from the hat without any break and that the second party had never made any collection. With regard to the question as to the date of the creation of the disputed ganti tenures, the learned Magistrate held that these tenures had come into existence before the creation of the patni. On these findings the learned Magistrate declared the first party to be in possession of the disputed property and forbade every disturbance to such possession until eviction by the civil Court. A good deal of discussion has centred round the question whether the learned Magistrate had jurisdiction to hold that the ganti tenures were in fact created before the creation of the patni which was purchased by the second party on 15th May 1939. It is contended by Mr. N. K. Basu that in effect the second party had been put into possession of these gantis rightly or wrongly by the order of the civil Court and that this lady was entitled to retain posses-

sion until she was duly evicted as a result of a civil Court decree. It may be mentioned that, when the learned Judge decided on 27th February 1941, that a proclamation should issue, his judgment contained no finding with reference to the existence or non-existence of the disputed ganti tenures. Obviously, in deciding that the proclamation should issue the learned Judge could only decide that such a proclamation should issue in accordance with the statutory provisions which regulate this matter. Section 15 (2), Patni Taluks Regulation, provides that :

"When the new purchaser shall proceed to take possession of the lands of his purchase, if the late incumbent himself or the holders of tenures or assignments derived from the late incumbent and intermediate between him and the actual cultivators, shall attempt to offer opposition a proclamation shall then issue declaring that the new incumbent having, by purchase at a sale for arrears of rent due to the zamindar,—acquired the entire rights and privileges attaching to the tenure of the late talukdar, in the state in which it was originally derived by him from the zamindar, he alone will be recognized as entitled to make the zamindari collection in the mufassal."

The terms of the proclamation which was actually issued as a result of the order of the learned Judge, dated 27th February 1941, have been placed before us. This proclamation was strictly in accordance with the terms of S. 15 (2), Patni Taluks Regulation, and it appears that as a result of this proclamation the second party could only be placed in possession of the patni in the state in which it was originally derived by the late incumbent from the zamindar. This being the case when, at a later stage of the proceedings, a dispute arose whether or not the second party had taken possession of the disputed gantis under the proclamation, it became essential for the learned Magistrate during the course of the proceedings under S. 145, Criminal P. C., to decide this point after finding whether these gantis had been created before or after the date on which the patni itself came into existence. He has decided in fact that these gantis were created before the patni which was purchased by the second party on 15th May 1939. It is clear from the facts which have been found, from the terms of the proclamation and from the provisions contained in S. 15, Patni Taluks Regulation, that the second party did not actually obtain possession of these gantis as a result of any proceedings taken after her purchase of the patni. The findings contained in the judgment of the learned Magistrate must be regarded as findings of fact. In this view of the case the rule fails and must be discharged.

Sen J. — This rule was obtained by the second party against an order passed in pro-

ceedings under S. 145, Criminal P. C. The second party's case is that she as purchaser of a patni at a sale under the Patni Sales Law, obtained possession of the property sold and that thereafter the first party was attempting to dispossess her. The case of the first party is that they were the owners of a ganti right over the land and that their ganti tenure was created before the patni was created and consequently could not be and was not annulled by the sale under Patni Sale Law and the proceedings held thereunder. They claimed that they had been in possession of the land as gantidars uninterruptedly and that the steps taken by the second party did not result in their being dispossessed. The finding of the Court below is that the ganti tenure possessed by the first party was created before the creation of the patni and that it could not be and was not annulled. The second finding is that the gantidars who are the first party remained in uninterrupted possession and that they were not dispossessed by the steps taken by the second party subsequent to the purchase of the patni. On these findings the possession of the first party was declared and maintained. This rule was obtained on only one ground which is as follows :

"For that it having been found as a fact that your petitioner was in possession from 20th to 31st March 1941, the order of the learned Magistrate is without jurisdiction and illegal."

On going through the judgment of the Court below I find there was no such finding at all. On the contrary, the finding of the learned Magistrate is that the first party was in possession uninterruptedly without any break. The rule should, therefore, be discharged on the ground that there is no such finding as that mentioned in the ground upon which the rule was issued. Mr. Basu, however, contends that on the facts found by the learned Magistrate he was not entitled in law to come to any other finding but that the petitioner was in possession of the land from 20th to 31st March 1941 and he bases this contention on certain facts which I shall now mention. After purchasing the patni the second party could not get possession and she had to take recourse to the provisions of S. 15, Patni Sale Law. She applied for the aid of the civil Court under S. 15 (2), Patni Sale Law for the purpose of obtaining possession. The Court heard the matter in the presence of the second party and some persons who had already sold their interest in the ganti tenure to the first party. Those persons were claiming a darpatni interest and not a ganti tenure. The first party did not appear. The civil Court issued a proclamation and thereafter a police help

was taken by the second party. Mr. Basu argues that the fact that the proclamation was issued and that police help was taken had the effect of giving possession to the second party even if actual possession had not been given. I may mention here that at the time the question whether or not the proclamation should issue was being decided by the civil Court, the point whether this ganti was still in existence or not was never raised or decided. In my opinion, the mere fact that the proclamation was issued and that police help was taken does not necessarily mean that the first party was dispossessed in law. I have said before that the finding is that there was no actual dispossession. The learned Magistrate has found that the police were not able to dispossess the first party. The effect of the proclamation was merely to give the purchaser a declaration that he had obtained the patni in the state in which it was when it was created and that no payments made to any other individual would be credited to the raiyats or others who were sued for rent or on any other occasion whatever when the same may be pleaded.

It is well established that a purchaser at a patni sale gets the patni as it existed at the time of its creation and that tenures created prior to the creation of the patni are not affected by the sale. The proclamation issued under S. 15 (2), Patni Sale Law, declares nothing more than this and it cannot be said that merely because a proclamation was issued and steps were taken to give effect to the proclamation the owners of tenures created before the patni were dispossessed. There is accordingly no substance in the contention of Mr. Basu that the possession of the first party was put an end to by the issue of the proclamation under S. 15 (2), Patni Sale Law, or by the action taken by the police in the proceedings subsequent to the rule. I therefore agree with my learned brother that this rule should be discharged.

R.K.

Rule discharged.

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MITTER AND AKRAM JJ.

Rajani Kanta Pal — Appellant

v.

Hrishikesh Das & others—Respondents.

Appeal No. 85 of 1942, Decided on 22nd May 1944, from original decree of Sub-Judge, 2nd Court, Dacca, D/- 10th September 1941.

(a) Civil P. C. (1908), O. 3, R. 4 — Admission by pleader on question of law if can be withdrawn.

An admission made by a party's pleader in the trial Court on a question of law can be allowed to be withdrawn in appeal. [P 393 C 1]

(b) Bengal Money-Lenders Act (10 of 1940), S. 36 — Agreement giving relief to borrower if may be reopened—Adjustment remitting certain amount and settling principal at certain amount—Extent to which adjustment may be reopened.

The provisions of the Bengal Money-Lenders Act do not wipe out all contracts between a lender and a borrower. Terms of contracts between them are affected if they go, and only to the extent they go, against the provisions of that Act which are intended to lighten the burden of the debt. A contract by which the lender himself relieves the burden of the borrower only furthers the intention of the Legislature and cannot be reopened even when it is embodied in the same instrument which contains another contract between the lender and the borrower which the Court is empowered to reopen if it has reason to believe that its reopening would give relief to the borrower on the terms of the Act. Accordingly where by an adjustment a certain amount is remitted and the principal outstanding at the date of the adjustment is settled at a certain amount, the remission cannot be reopened but the settlement as regards the principal can be reopened under the Act. [P 394 C 1,2]

(c) Bengal Money-Lenders Act (10 of 1940), S. 33—Scope of—Lawyer's fees for putting mortgage transaction through and tohoric for mortgagee's officers if can be deducted.

Section 33 was intended against money lender's commissions and things of like nature. A mortgagee is entitled to retain the amount paid by him to his pleader as the latter's fees for carrying the mortgage transaction through but deduction by him of an amount as tohoric for his own officers cannot be allowed especially when there is no evidence that the officers actually got the sum. [P 394 C 2; P 395 C 1]

(d) Bengal Money-Lenders Act (10 of 1940), Ss. 30 and 36 — Mortgage suit — Pendente lite interest can be granted—Act is no bar—Rate of pendente lite interest.

The provisions of the Act do not prevent the Court from giving pendente lite interest in a mortgage suit. The rate of pendente lite interest is in the discretion of the Court and may be awarded at a rate below the contract rate : ('40) 27 A.I.R. 1940 F.C. 20, *Rel. on.* [P 395 C 1]

(e) Bengal Money-Lenders Act (10 of 1940), Ss. 30 and 36—Mortgage—Adjustment—Certain amount remitted and principal settled at certain figure — Amount due reduced by calculating interest at 8 per cent. simple instead of at $8\frac{1}{2}$ per cent. (compound)—Grant of proportionate remission held incorrect — Mortgagor held entitled either to full remission or to none at all.

Under a mortgage bond of 1928 which carried interest at $8\frac{1}{2}$ per cent. compound after allowing credit for payments made and calculating interest at the aforesaid rate Rs. 1,64,217 were found due in 1936. The mortgagee remitted Rs. 48,012 and the amount of Rs. 1,16,000 was settled as the amount of the principal. The trial Court calculated the interest at the statutory rate under S. 30 and held that the mortgagor could claim only proportionate and not full remission. It calculated the amount of remission to be allowed to the mortgagor in the following manner. As Rupees 48,012 was remitted on the footing that Rs. 1,64,012 was the amount then due and as on calculating interest at 8 per cent. (simple) in terms of S. 30, Bengal Money-Lenders Act, instead of at the rate of $8\frac{1}{2}$ per cent. (compound) in terms of the bond Rs. 1,44,019-4-0 would be payable the remission was in the proportion which Rs. 1,44,019 bore to the figure 1,64,012 i.e., Rs. 42,150.

Held that the reasons of the trial Court for allowing proportionate remission were not correct. The mortgagor was either entitled to the full remission of Rs. 48,012 or to none at all. [P 393 C 1]

Atul Chandra Gupta, Jatindra Nath Sanyal, Shibakali Bagchi and Satya Priya Ghose—
for Appellant.

Dr. N. C. Sen Gupta, Abinash Chandra Ghose and Asoke Chandra Sen — for Respondents.

Pannalal Chatterjee — for Deputy Registrar.

Judgment. — On 18th November 1928 defendant-respondent 1 Hrishikesh Dass purported to borrow from the plaintiff appellant Rs. 1,60,000 on the security of immovable properties. The mortgage bond which was executed on that date provided for payment of compound interest at the rate of $8\frac{1}{2}$ per cent. per annum with yearly rests. Thereafter he paid large sums of money on diverse dates totalling Rs. 1,02,205. On calculating interest in terms of the mortgage bond and after giving credit for the payments Rs. 1,64,217-0-0 was found due from him on the 31st Chaitra 1342 B. S. (=14th April 1936). At the intervention of common friends, Rai Bahadur Satyendra Nath Dass and Jogesh Chandra Das, the appellant agreed to remit the sum of Rs. 48,012. On 14th Asar following corresponding to 18th June 1936 a memorandum (Ex. 4) signed by both the appellant and the respondent was addressed to Rai Bahadur Satyendra Nath Dass and Jogesh Chandra Dass. The material portion of the said memorandum runs thus :

"After giving credit for payments made towards interest and after deducting Rs. 48,012 only for remission allowed, a sum of Rs. 1,16,000 remains due as principal on the 1st Bysack 1343 B. S. in respect of the mortgage bond executed by Hrishikesh Babu. I, Hrishikesh Dass, acknowledge the said debt. From the 1st Bysack last interest will run on the aforesaid principal sum at the bond rate."

The plaint was filed before the Bengal Money-Lenders Act, 10 of 1940, had been passed. The claim at the date of the suit was laid at Rs. 1,03,524-8-0. While the suit was pending that Act came into force. The learned Subordinate Judge after taking into consideration S. 30 of that Act and also other defences has decreed the suit for Rs. 90,107 plus costs. He has directed payment in fifteen annual instalments. He found that Rupees 1,53,687-9-0 and not Rs. 1,60,000, as stated in the bond, had been actually advanced and that Rs. 63,286 only was the principal and Rs. 20,832 arrears of interest due at the date of the suit. He allowed Rs. 6882 as pendente lite interest. In arriving at the finding that Rs. 84,118 was due to the plaintiff at the date of the suit on account of principal and interest, he held that the defendant was not entitled to get the benefit of the full remission (Rs. 48,012) made by the plaintiff and noticed in Ex. 4. Proceeding on the admission of the plaintiff's pleader (an admission, which the plaintiff's advocate appearing before us has withdrawn) he held that defendant was entitled only to propor-

tionate remission. He calculated the amount of remission to be allowed to the defendant in the following manner. As Rs. 48,012 was remitted on the footing that Rs. 1,64,012 was the amount then due and as on calculating interest at 8 per cent (simple) in terms of S. 30, Bengal Money-Lenders Act, instead of at the rate of $8\frac{1}{4}$ per cent. (compound) in terms of the bond, Rs. 1,44,019-4-0 would be payable, the remission was calculated in the proportion which 144019 bore to the figure 164012. Applying the rule of three, the amount came to Rs. 42,150 and not Rs. 48,012 and that sum and not Rs. 48,012 he allowed as remission to the defendant. Against the decree of the Subordinate Judge the plaintiff has preferred this appeal. The defendant has filed a memorandum of cross-objections. The plaintiff's contentions are : (i) that in view of the amount claimed by the plaintiff in the suit no relief to the debtor under the Bengal Money-Lenders Act is admissible, and (ii) that the rate at which pendente lite interest has been given is inadequate.

The defendant has urged the following points in support of his cross-objections : (i) that the learned subordinate Judge ought to have deducted the full amount of Rs. 48,012, which the plaintiff had remitted, (ii) that the Court below ought to have held that the amount actually advanced was less than Rs. 1,53,687-9-0, and (iii) that the Court below ought to have held that the defendant had paid more than what the plaintiff has admitted.

The first point urged in the appeal and the first point urged in support of the cross-objection.

These two points depend upon the same question of law, which we now proceed to determine. As the admission made by the plaintiff's pleader in the lower Court that the defendant was entitled to a proportionate remission is an admission on a point of law we allow the plaintiff's advocate appearing before us to withdraw the same. On the merits of the question, we do not agree with the learned Subordinate Judge's reasons for allowing proportionate remission. In our view the defendant is either entitled to the full remission of Rs. 48,012 or to none at all. Section 36, Bengal Money Lenders Act (hereafter called the Act) gives the Court certain powers to be exercised only if it has reason to believe that the exercise of one or more of those powers would give relief to the borrower (S. 36 (1)). One of those powers is the power to reopen transactions and to take accounts. Adjustments or agreements between the lender and the borrower which are within 12 years of the suit can be reopened. Only adjustments

and agreements which purport to close previous transactions and to create new obligations and which are beyond 12 years of the suit cannot be reopened. Exhibit 4 can, therefore, be reopened if by reopening it the borrower would get relief on the provisions of the Act, as it is within 12 years of the suit. For the purpose of following the arguments of the learned advocates the following are the figures in the three contingencies indicated below. Those figures have been supplied by them. We ourselves have not checked them but proceed upon them as no inaccuracies have been pointed out to us by the opposing advocates.

I. If Ex. 4 be totally disregarded—that is to say, if the adjustment, together with the agreement regarding the remission be disregarded and account be taken of the loan on the footing that interest payable is 8 per cent. simple in terms of S. 30 of the Act, a sum of Rs. 1,26,000 odd would be the dues of the plaintiff at the date of the suit—an amount much above the claim as laid in the plaint.

II. If the adjustment as embodied in Ex. 4 be only re-opened that is to say if only the agreement to treat Rs. 1,16,000 as principal be re-opened but the remission of Rs. 48,012 be maintained the sum of Rs. 82,686 odd would be amount of principal and Rs. 33,314 odd would be the arrears of interest due on 31st Chaitra 1342 B. S. on the footing that interest payable was 8 per cent. simple. That is to say, that although on that date the total debt of the defendant would be Rs. 1,16,000 only Rs. 82,686 would be the outstanding principal and the balance interest. On that basis the sum of Rs. 59,000 would be the balance of the principal and Rs. 23,840 would be the interest outstanding at the date of the suit in view of the fact that further payments had been made by the defendant after 1st Bysack 1343 and that interest payable under the law is 8 per cent. simple and not what has been provided for in the bond.

III. If Ex. 4 is untouched, that is to say, if the remission of Rs. 48,012 is left intact as also the adjustment by which Rs. 1,16,000 was to be taken as the principal outstanding on 1st Bysack 1343, then the sum of Rs. 1,02,000 odd would be due at the date of the suit if interest is calculated at the rate of 8 per cent. simple. The claim as laid in the plaint is excessive by about Rs. 1000 and Mr. Gupta appearing for the plaintiff concedes that position and is prepared to take a decree on that footing. All these figures which we have noted above proceed upon the finding of the learned Subordinate Judge that Rs. 1,53,687-9-0 and not Rs. 1,60,000 was the actual advance.

Mr. Gupta contends that the Court has power to re-open Ex. 4, as the adjustment and agreement embodied therein is not protected by proviso (i) to S. 36 (1) of the Act. But he contends that if the Court re-opens it, it must re-open not a part of it but the whole of it. This contention of his is based on the grammatical meaning of the word "to re-open" which means "to discard." If that contention of his be accepted, the Court ought not to re-open it, in view of the provisions of S. 36 (1) of the Act which we have noticed in the earlier part of our judgment, for the re-opening would not give any relief to the borrower. In that case the decree ought to be on the basis of the figure we have noticed under heading No. III, and the amount decreed by the learned Subordinate Judge will have to be enhanced. As we do not accept his contentions for the reasons hereafter following, we do not determine what would be the amount of enhancement.

In the suit both the plaintiff and defendant deposed. The defendant however was examined first. In his deposition he stated that in Magh or Falgoon 1342 (February or March 1936) the plaintiff agreed to give him the remission if he paid Rs. 50,000 by the month of Chaitra following (Chaitra 1342), and that as he in fact paid Rs. 50,000 on 20th Chaitra 1342, by selling his Magrapara property the said sum of Rs. 48,012 was remitted and the fact of remission was noted in Ex. 4. This statement of the defendant has not been denied by the plaintiff who had the opportunity of denying it, as he deposed after the defendant. The remission of Rs. 48,012 therefore rests on the distinct contract supported by good consideration.

The provisions of the Bengal Money-Lenders Act do not wipe out all contracts between a lender and a borrower. Terms of contracts between them are affected if they go, and only to the extent they go, against the provisions of that Act which are intended to lighten the burden of the debt. The principal alleviative provisions are those enacted in Chaps. VI and VII of the Act. For the purpose of this appeal Ss. 30 (1) (c) and 30 (2) are material. A contract by which the lender himself relieves the burden of the borrower only furthers the intention of the legislature. There would thus be no meaning of reopening such a contract, for its reopening would give no relief to the borrower, but on the other hand would take away the relief which the lender himself had condescended to bestow on him. From this it would follow that such a contract cannot be reopened even when it is embodied in the same instrument which contains another contract between the lender and borrower which the Court is empowered to reopen if it has

reason to believe that its reopening would give relief to the borrower on the terms of the Act. We accordingly hold that the remission stands in full and that the adjustment contained in Ex. 4 by which the outstanding principal was settled at Rs. 1,16,000 can be reopened and that figure can be analysed to find out what part of it would represent the principal outstanding on 1st Bysack 1342 and what part the arrears of interest. That analysis must proceed on the basis of Ss. 30 (1) (c) (ii) and 30 (2) for the Act. The learned advocate for the respondent stated that the analysis made on that basis would give us the sum of Rs. 82,686 as principal and Rs. 33,314 as interest outstanding on 1st Bysack 1342 B.S. As we did not ourselves check these figures, the officer preparing our decree would check the same. In checking the figures the principal of the original loan would be taken to be the sum of Rs. 1,53,687 less the sum of Rs. 550, the amount which we hold had not been advanced by the lender for the reasons indicated in our judgment on the second point argued in support of the cross-objections. In making the calculation interest at 8 per cent. (simple) would be awarded and the payments made from time to time by the debtor as are shown in the schedule attached to the plaint to be taken into consideration. The full remission of Rs. 48,012 would also be taken into account.

Point 2 of the cross-objections.

The defendant contends that Rs. 2000 out of the consideration was withheld from him. This sum was not admittedly paid by the plaintiff to the defendant, but was retained by him and was applied as follows : Rs. 1200 was spent by the plaintiff for buying the stamp impressed on the mortgaged deed, Rs. 250 was paid by the plaintiff to his pleader as the latter's fees for carrying the mortgage transaction through and Rs. 550 was retained by him for the tohric (remuneration) of his own officers. The defendant says that the contract between him and the plaintiff was that the latter was to pay for the stamp required on the mortgage. We cannot accept his story. There thus remain for consideration the other two items of Rs. 250 and Rs. 550. The defendant contends that S. 33 of the Act makes those deductions illegal. Paragraph 1 of that section makes an agreement between the lender and borrower illegal by which the borrower agrees to pay to the lender any sum on account of costs and charges incidental or relating to the negotiations for or the granting of the loan. That section was intended against money-lender's commissions and things of like nature. An agreement to pay the fees of the lender's lawyer for investigating title in

the case of a mortgage is excepted. As Rs. 250 was paid to the lender's lawyer under an agreement for that purpose, the defendant can take no objection to that sum. The amount of Rs. 550 deducted by the plaintiff for tohoric to his own officers, however, stands on a different footing. There is no evidence that the officers actually got the sum. It appears to us that the said sum was retained by the plaintiff under a false garb. That sum must accordingly be deducted. The principal of the loan must therefore be taken to be rupees 1,53,137-9-0 and not Rs. 1,53,687-9-0.

Point No. 3 of the cross-objections.

This involves a sum of Rs. 3000. The defendant's case is that on 16th October 1936 he paid Rs. 31,000 to the plaintiff by selling his garden Golap Bag, but a credit of Rs. 28,000 only was given. His further case is that he paid the whole sum towards principal but only a part was credited towards principal and the rest towards interest. The plaintiff's account as appended to the plaint shows that on 30th Aswin 1343 B. S. (=16th October 1936) a sum of Rs. 23,400 was credited towards principal and Rs. 4600 towards interest. The defendant admits that he paid Rs. 28,000 to the plaintiff and Rs. 3000 to the plaintiff's son as a sop, as the plaintiff's son wanted to buy that garden. The sum of Rs. 3000 in these circumstances cannot be regarded as a payment towards the plaintiff's dues. The defendant further admits that he signed the endorsement of payment on the mortgage deed allocating the sum of Rs. 28,000 towards principal and interest in the manner indicated in the plaintiff's account. We cannot accordingly accept this point.

Point No. 2 of the Appeal.

It has been decided in this Court that the provisions of the Bengal Money-lenders Act do not prevent the Court from giving pendente lite interest in a mortgage suit. It has been further held that the rate of pendente lite interest is in the discretion of the Court and may be awarded at a rate below the contract rate: 44 C. W. N. F. R. 21¹ at p. 25. In this case the Court has awarded a lump sum of Rs. 6882 as pendente lite interest. The rate works out at about 2½ per cent. We think that in the circumstances of this case that rate is too low. The suit was filed on 6th May 1935. The defendant posed as an agriculturist and went to the Debt Settlement Board. At his instance the suit was stayed under the provision of S. 34, Bengal Agricultural Debtors Act, from 11th June 1935 to 22nd November 1936. After the stay was vacated he filed his

written statement as late as 9th February 1940 and even thereafter dragged the suit further by applying for adjournments. No doubt the suit was held up for about six months in the lower Court as the records were brought up in this Court in connexion with an appeal from about April 1940 to about February 1942. In these circumstances we think that pendente lite interest should be allowed at 4 per cent. per annum. The result is that both the appeal and the cross-objections are allowed in part. As the success is divided the parties would bear their respective costs in this Court. The plaintiff would get proportionate costs of the Court below. The costs decreed to be added to the mortgage claim. The defendant must pay the decretal amount in fifteen equal annual instalments; the first of such instalment to be paid within Chaitra 1351 B. S. and the succeeding instalments within Chaitra of each succeeding year. In default of payment of any one instalment the plaintiff will be at liberty to apply for a final decree in terms of S. 34 (1) (a) (ii), Bengal Money-lenders Act. Let a self-contained preliminary decree be drawn up in this Court.

G.N.

Order accordingly.

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SEN J.

S. M. Solaiman — Petitioner

v.

Noor Mahommed and another —

Respondents.

Election Petition Decided on 29th May 1944.

(a) Calcutta Municipal Act (3 of 1923), S. 30— Rules under, R. 14 (2) (b) — Several nomination papers delivered in bundle — "First received" is that which is numbered first — Paper bearing earliest serial number rejected on ground of proposer having subscribed other papers — Rejection held illegal.

Where all the nomination papers are delivered in a bundle, it is just and reasonable to hold that the paper which bears the earliest serial number is the paper which was first received. Held therefore that nomination paper No. 9 must be taken to have been first received for the purposes of R. 14 (2) (b) and it was entitled to the benefit of that rule and must be deemed to be valid in spite of the fact that the proposer named therein had subscribed his name as proposer in the other nomination papers received later i. e. No. 14. The Returning Officer was thus wrong in rejecting paper No. 9. [P 397 C 1, 2]

(b) Calcutta Municipal Act (3 of 1923), S. 30— Rules under, R. 14 (1) (iv) — Scope of sub-rule— Nomination paper when can be rejected under the sub-rule stated.

Rule 14 (1) (iv) does not contemplate a case where a seconder is by mistake given a wrong electoral number in the nomination paper. It presupposes that the electoral number given in the nomination paper to the person named as seconder and the number of that person in the electoral roll tallies and enacts that if the seconder is not identical with the person who bears that electoral number then the nomination paper will be rejected; in other words,

1. ('40) 27 A.I.R. 1940 F. C. 20: 44 C. W. N. F. R. 21, Jaigobind Singh v. Lachminarain Ram.

what the rule provides is that if the person bearing that electoral number comes forward and says he is not the seconder or if some one else proves that such person is not the seconder the nomination paper will be rejected. The sub-rule does not contemplate the rejection of a nomination paper merely because an erroneous number is given. The identity of the person and not a mere error in giving his electoral number is the factor which the returning officer has to consider in deciding whether a paper should be rejected.

[P 397 C 2 ; P 398 C 1, 2]

(c) Calcutta Municipal Act (3 of 1923), S. 47—“Result of election” explained — Candidate illegally excluded from contesting election—Result of election is affected and election must be set aside—It need not be proved that successful candidate would not have been returned—Bona fides of Returning Officer challenged — He is necessary party to election proceedings.

The result of an election certainly includes the return of a candidate and this is one of the most important elements in the result but it does not constitute the whole result. The “result of the election” in its most comprehensive sense is the expression of the will or decision of the electorate. If the candidate has been wrongfully and illegally excluded from contesting the election it follows that the result of the election has been materially affected. It is not necessary for him to show that the returned candidate would not have been returned. If a person has been illegally prevented from standing for election by reason of a non-compliance with the rules it is impossible for him to prove that the returned candidate would not have been returned without holding a mimic election in Court. His difficulties would be still further increased if there were three candidates standing for election. Voting is to be in secret and it could never have been intended that persons should come to Court and declare for whom they would vote. There can hardly be a more just ground for setting aside an election than the ground that a person has been illegally and wrongfully deprived of the right to contest the election. If allegations are made against the Returning Officer challenging the correctness of his conduct and challenging his bona fides, the proper course would be to make him a respondent.

[P 399 C 2 ; P 400 C 1]

Kalyan K. Basu and Nirmal C. Sen

for Petitioner.

S. M. Bose (Advocate-General), S. Chaudhuri and S. K. Dutt; and B. C. Ghosh and S. Sinha
— for Respondents 1; and 2, respectively.

Order. — The petitioner was a candidate for election to the Calcutta Corporation from the Mahomedan Constituency of Ward No. 25. There was only one vacancy to be filled up from that ward. There were three candidates. The petitioner filed six nomination papers; they were all rejected at the scrutiny by the returning officer, Dr. S. Z. Ahmad, respondent 2 and respondent 1, Mr. Noor Mahammad was elected Councillor defeating the other candidate, Mr. Mahammad Ali Khan. The respective number of votes obtained by each was 142 and 109 respectively. The petitioner seeks to set aside the election on the ground that the returning officer illegally and unfairly rejected his nomination paper. He alleges that the result of the election has been materially affected by this illegal and wrongful rejection. The admitted and unchallenged facts

are these. On 28th February 1944 the petitioner delivered to the returning officer six nomination papers. The returning officer received and marked them serially with the numbers 9 to 14. The proposers and seconders in the respective nomination papers were as follows:

- No. 9—Proposer—Dr. K. Ahmed (being elector No. 261)
Secunder—S. Amir Hossain (being elector No. 24)
- No. 10—Proposer—Shawkat Ali (being elector No. 102)
Secunder—Dr. K. Ahmed (being elector No. 261)
- No. 11—Proposer—Dr. K. Ahmed (being elector No. 261)
Secunder—Sk. Ali Hossain (being elector No. 157)
- No. 12—Proposer—Shawkat Ali (being elector No. 102)
Secunder—Dr. K. Ahmed (being elector No. 261)
- No. 13—Proposer—S. Amir Hossain (being elector No. 24)
Secunder—Sk. Abdul Sovan (being elector No. 248)
- No. 14—Proposer—Dr. K. Ahmed (being elector No. 261)
Secunder—Shawkat Ali (being elector No. 102 but wrongly described as No. 12 on this nomination paper.)

It should be noted that in nomination paper No. 14 the Secunder's number in the electoral roll was given as 12 whereas in the electoral roll his number was 102.

At the time of scrutiny the returning officer first took up nomination paper No. 14 and rejected it on the ground that the person whose number in the electoral roll was 12 was not Shawkat Ali but some one else. He purported to act under R. 14 (1) (iv) of the rules framed by the Government under the Calcutta Municipal Act. He then took up nomination paper No. 9 and rejected it on the ground that K. Ahmed, the proposer named therein, had also subscribed his name as proposer in nomination paper No. 14. He held that there being only one vacancy a proposer was entitled to subscribe one nomination paper only under R. 6 of the aforesaid rules and that consequently the nomination paper No. 9 was also bad. Thereafter he took up the other nomination papers and rejected them on the same ground. The first point urged by the petitioner is that nomination paper No. 9 having been first received by the returning officer it could not be rejected on the ground that the proposer had subscribed as proposer on another nomination paper inasmuch as a paper first

received must be deemed to be valid so far as this defect is concerned. He relies on R.14 (2) (b) which is in these terms :

"Where a person has subscribed whether as proposer or seconder a larger number of nomination papers than there are vacancies to be filled, those of the papers so subscribed which have been first received, up to the number of vacancies to be filled, shall be deemed to be valid."

The sub-rule is quite clear. If nomination paper No. 9 had been first received by the returning officer then, in spite of the fact that the same proposer had subscribed his name in the subsequently received nomination papers, that nomination paper must be deemed to be valid. The learned Advocate-General appearing for respondent 1 agrees that this must be so ; but he contends that sub-r. (2) (b) of R. 14 cannot apply as all the nomination papers were made over to the returning officer by the candidate "in a lump" and it was not possible to say that paper No. 9 was first received. If his view be correct then a candidate cannot avail himself of the benefit of this sub-rule unless he hands over his nomination papers one after the other with an interval of time between each handing over. I cannot imagine that there could have been any such intention in the authority that made the rule. A candidate is allowed under the Act to deliver to the returning officer as many nomination papers as he chooses. If he has several nomination papers ready before going to the returning officer it would be but natural for him to make them over in one bundle to the returning officer. It would be unreasonable to hold that unless he made them over one after the other with a pause between each handing over he must be deprived of the benefit of R. 14 (2) (b). It may be to avoid an argument of this nature that R. 10 provides that on receiving a nomination paper the returning officer

"shall enter on it its serial number and shall sign a certificate stating the date on which and the hour at which the nomination paper has been delivered to him."

Here the time of receipt entered on all the six nomination papers is the same. They were undoubtedly handed over in one bundle but the returning officer had to put serial numbers on them; the first serial number was No. 9 and it was put on the nomination paper under consideration. In my opinion although all the papers were delivered in a bunch it is just and reasonable to hold that the paper which bears the earliest serial number is the paper which was first received. Delivery and receipt are not the same thing. A thing is received when a person takes it with the intention of accepting it. The returning officer signifies his acceptance on receipt of a document when he puts a serial number on it. The receipt is

complete when the serial number is put. After this the next document is taken up and the receipt is completed in the same way. In my opinion although all the nomination papers were delivered in a bundle nomination paper No. 9 must be taken to have been first received for the purposes of R. 14 (2) (b). That being so it is entitled to the benefit of that rule and must be deemed to be valid in spite of the fact that the proposer named therein has subscribed his name as proposer in the other nomination papers received later. The returning officer was therefore wrong in rejecting this paper. I next take up for consideration the rejection of nomination paper No. 14. The returning officer has rejected it, purporting to act in accordance with the provisions of R. 14 (1) (iv) which is as follows :

"14. (1) The returning officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination, and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, refuse any nomination on any of the following grounds :

(iv) that the candidate or the proposer or seconder is not identical with the person whose electoral number is given in the nomination paper as the number of such candidate, proposer or seconder, as the case may be."

As stated before, the seconder Shawkat Ali's number in the electoral roll is 102 but in the nomination paper his electoral roll number was erroneously given as 12. It is not suggested that the seconder is not identical with Shawkat Ali. The one is identical with the other. It is nobody's case that the name of a fictitious seconder has been put on the nomination paper or that some one has personated some one else. Put shortly the nomination paper has been rejected because Shawkat Ali's roll number has been wrongly given or, as has been stated by the returning officer, because the "number of the seconder as given in the nomination paper does not tally with his number in the electoral roll." Now, does R. 14 (1) (iv) direct a nomination paper to be rejected on a ground like this? The learned Advocate-General argues that it does. I am unable to agree. The sub-rule does not contemplate a case where a seconder is by mistake given a wrong electoral number in the nomination paper. It presupposes that the electoral number given in the nomination paper to the person named as seconder and the number of that person in the electoral roll tallies and enacts that if the seconder is not identical with the person who bears that electoral number then the nomination paper will be rejected; in other words, what the rule provides is that if the person bearing that electoral number (and if I am right in my interpretation he will also bear the same name

as that given in the nomination papers) comes forward and says he is not the seconder or if some one else proves that such person is not the seconder the nomination paper will be rejected. The sub-rule does not contemplate the rejection of a nomination paper merely because an erroneous number is given. I agree that the drafting of Rule 14 (1) (iv) does not make its meaning very clear but I am convinced for the further reasons which I shall presently give that the meaning is as stated above and not as suggested by the returning officer and the learned Advocate-General. My reasons for holding that the sub-rule is based on the presumption that there has been no mistake regarding the electoral number are based principally on R. 9 which is as follows :

"9. On the presentation of a nomination paper, the returning officer shall satisfy himself that the names and numbers on the electoral roll of the candidate and his proposer and seconder as entered in the nomination paper are the same as those entered in the electoral roll. Where necessary he shall direct that the former be amended so as to be in accordance with the latter.

It shall be also competent for the returning officer to alter or amend any entry in the nomination paper presented to him with a view to ensuring accurate and adequate publication under R. 10 of the names of candidates and of persons who have subscribed the nomination paper as proposer and seconder."

The section clearly lays a duty upon the returning officer at the time of receiving the nomination paper to satisfy himself that the electoral number is correctly given. If it is not correctly given it is his duty to direct the candidate to correct the mistake. If the candidate does not correct it or if he discovers the error when the candidate is not available he is given the power to make the correction himself. After making these corrections he is directed to publish a notice containing descriptions similar to those given in the nomination paper. The reason for having every thing corrected before publication is obvious. The voters and other candidates must have a correct statement of the names and numbers of the proposer, seconder and candidate in order to decide as to whom they should give their votes and also to decide if they will take any objection at the time of the scrutiny. Rule 9 has been enacted to ensure that the names and electoral numbers shall be correct and shall tally before publication. Scrutiny and rejection come after publication. This stage is dealt with by R. 14. The law always presumes that official duties are duly performed. Rule 14 must therefore be based on the presumption that the returning officer has done his duty in accordance with R. 9 and that he has satisfied himself that

"the names and numbers on the electoral roll of the candidate and his proposer and seconder as entered

in the nomination paper are the same as those entered in the electoral roll."

I am here quoting the very words of R. 9. If that be correct, can it be reasonable to interpret R. 14 as directing the same returning officer to reject a nomination paper because the electoral number in the nomination paper does not tally with the electoral number in the electoral roll? In other words can this rule mean that the returning officer is to reject a nomination paper and debar a candidate from standing for election because he (the returning officer) has failed to perform the duties imposed upon him by the earlier R. 9? Such an interpretation would be absurd. The absurdity of this construction can be demonstrated in another way. If this construction be adopted I would have to hold that the law has given the returning officer two conflicting directions, one to correct the erroneous electoral number in the nomination paper and another to reject the nomination paper because it contains an erroneous electoral number. In my opinion, an interpretation leading to this result is manifestly absurd. If the sub-rule be carefully analysed it will, I think, be clear that this is not the meaning of the relevant words used. They are :

"... the seconder is not identical with the person whose electoral number is given in the nomination paper as the number of such ... seconder ..."

If the sub-rule intended to direct the rejection of a nomination paper on the ground of a mere error in the giving of the electoral number or if it contemplated such an error to be possible in spite of the provisions of R. 9 it would have been framed thus "... the seconder is not identical with the person whose electoral number is the same as that given in the nomination paper as the number of such seconder." The words used however are not these and to my mind the phraseology employed indicates that the identity of the person and not a mere error in the giving of his electoral number is the factor which the returning officer has to consider in deciding whether a paper should be rejected.

I hold, therefore, that nomination paper No. 14 has also been wrongly rejected. I may state at this stage that I am not prepared to accept the statement of the returning officer that he asked the petitioner to correct the electoral number and that the petitioner had refused. The petitioner denies this. It is highly improbable that a person would take the trouble to fill in six nomination papers and take them to the returning officer and then refuse to correct it when a mistake is pointed out to him and thus run the risk of getting that nomination rejected. The next and most important question to be decided is whether

the election can be set aside because these nomination papers have been wrongly rejected. The learned Advocate-General draws my attention to S. 47 (1) (c) of the Act which is as follows :

"47. (1) Save as hereinafter provided in this section, if in any proceeding duly instituted under S. 46, the High Court is of opinion that —

(c) the result of the election has been materially affected by any irregularity in respect of a nomination paper, or by the improper reception or refusal of a vote, or, save as is provided in S. 46, by any non-compliance with the provisions of this Act or the rules made thereunder, or by any mistake in the use of any form annexed thereto, the election of the returned candidate shall be void."

He argues that it will not be enough for the petitioner to show a non-compliance with the provisions of the Act or rules thereunder on the part of the returning officer. He must show that the result of the election has been materially affected thereby. This is quite correct. Now, what has been the result of the returning officer's non-compliance with the rules made under this Act? A person has been wrongfully and illegally excluded from contesting the election. Would the Court be entitled to be of opinion that this wrongful and illegal exclusion has materially affected the result of the election? The learned Advocate-General says that it would not. The onus, he says, is on the petitioner to prove that respondent 1 would not have been elected but for this non-compliance.

Mr. Bose appearing for the petitioner argued that when the non-compliance is of a 'mandatory' provision then the Court must presume that the result of the election has been materially affected and he relied on 24 C.W.N. 189¹ where it was held that where there has been an infraction of a mandatory rule the defendant who maintains the validity of the election in spite of such infraction must prove that the result of the election was not materially affected by the infraction. That decision was based on the principles laid down in S. 13, English Ballot Act, which is as follows :

"13. No election shall be declared invalid by reason of a non-compliance with the rules contained in Sch. 1 to this Act, or any mistake in the use of the forms in Sch. 2 to this Act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in the body of this Act, and that such non-compliance or mistake did not affect the result of the election."

This section lays down that once a non-compliance with the rules has been established the onus lies on the person seeking to maintain the validity of the election to prove that the non-compliance did not affect the result of the election. I agree with the learned

Advocate-General that S. 47 (1) (c), Calcutta Municipal Act, is materially different from S. 13, Ballot Act. In our Act the onus is clearly put on the person seeking to set aside the election to satisfy the Court that the result of the election has been materially affected by the non-compliance. Learned counsel for the petitioner also referred to the *Ahmad-nagore case* (Khanna's Indian Election Cases, Vol. 3, 24) for showing what was meant by the words "materially affected." It was held there that if it could be shown that the majority of the elected candidates would have been materially reduced if he had not resorted to corrupt practice, then it could be held that the result of the election had been materially affected. I do not think that the case is of much help as it dealt with corrupt practices. The Judges expressly state at p. 27 that they were not dealing with the meaning of the phrase "materially affected" in sub-s. (1) (c) of S. 47 but with its meaning in sub-s. (1) (a). This case is concerned with sub-s. (1) (c). Some English decisions were also relied upon but I do not propose to deal with them as the English law is different from the law here. I prefer to come to my decision on the words of the section. The words used are "result of the election" and "materially affected." Now, what is the result of an election? The learned Advocate-General says that the "result of the election" means the return of a candidate and nothing more. I am unable to agree. The result of an election certainly includes the return of a candidate and I will concede that this is one of the most important elements in the result but it does not constitute the whole result. In my opinion the "result of the election" in its most comprehensive sense is the expression of the will or decision of the electorate. If A and B stand for election and A is elected the result of the election is the expression of the decision of the electorate that it prefers A to B. If A, B and C stand for election and if A is elected, is the result of the election the same? Superficially viewed it may be taken to be the same but the result is essentially different. At this election the electorate expresses its decision that A is more fitted to be elected not only than B but also than C. If therefore C has been wrongfully and illegally excluded from contesting the election it follows that the result of the election has been materially affected. It is not necessary for C in such a case to show that the returned candidate would not have been returned.

The section does not say that the Court must be of opinion that the returned candidate would have been unseated. It does not say that the Court must be of opinion that the result of the election would have been

1. (20) 7 A.I.R. 1920 Cal. 669 : 24 C. W. N. 189, Shyam Chand v. Dacca Municipality.

materially different, it says that "the result of the election has been materially affected." In my opinion a decision that A is better than B is not the same as a decision that A is better than B and C. If C comes into the competition the result of the competition must, at any rate, be considered as being materially affected if not materially different. I may add that even if the words in the section had been "materially different" my decision would have been the same in view of my interpretation of the words "result of the election." If any other view be taken, it would amount to putting an impossible burden on an unsuccessful candidate to discharge. No Court will construe a section as giving a person a right and at the same time imposing such conditions on that person as would render it impossible for him to realise that right. If a person has been illegally prevented from standing for election by reason of a non-compliance with the rules it is impossible for him to prove that the returned candidate would not have been returned without holding a mimic election in Court. His difficulties would be still further increased if there were three candidates standing for election. Voting is to be in secret and it could never have been intended that persons should come to Court and declare for whom they would vote. There can hardly be a more just ground for setting aside an election than the ground that a person has been illegally and wrongfully deprived of the right to contest the election.

In my view, the result of the election has been materially affected by the wrongful and illegal rejection of the nomination papers of the petitioner and it must therefore be set aside. There remains another question for decision. Mr. B. C. Ghose argues that the returning officer cannot be made a party to an election petition and he relies on *I.L.R. (1940) 2 Cal. 230*.² The case, however, in my opinion does not decide this. The headnote is not accurate. It was held by McNair J. in that case that the allegations made against the returning officer had not been established and in this view he held that the returning officer should not have been made a party (see bottom of p. 235 and the top of p. 236). I can see no principle underlying the contention that in no case should a returning officer be made a party respondent to an election petition. If allegations are made against the returning officer challenging the correctness of his conduct and challenging his bona fides, it seems to me that the proper course would be to make him a respondent. The view I have

held is supported by the observations made in Vol. 12, p. 395, Halsbury's Laws of England, Edn. 2 (Lord Hailsham). This is that what is stated at paragraph 782 :

"Where an election petition complains of the conduct of a returning officer, he will, for all the purposes of the Act, except as regards the admission of respondents in his place, be deemed to be a respondent. The allegation against the returning officer need not necessarily be one of wilful misconduct, and he may be joined as a respondent where the acts or omissions or negligence complained of are not personal but are those of his subordinates.

A petition complaining of an undue election or return of a member who has since died may be brought, notwithstanding his death."

In this case the returning officer, in my opinion, is a very necessary party. His conduct, to say the least, has been extraordinary. He fails to carry out the duties imposed upon him under Rule 9. After failing to perform his duties he takes up nomination paper No. 14 first instead of nomination paper No. 9. If he took up nomination paper No. 9 first he would have had to accept it as it contained no error regarding the electoral number and as it was not otherwise bad, he cannot give any acceptable explanation of why he took up nomination paper No. 14 before nomination paper No. 9. He says that nomination paper No. 14 was on the top; if it was on the top and he took that paper first because it was on the top then one would expect that the next paper which he would take up would not be nomination paper No. 9 but nomination paper No. 13. Now, if he had taken up nomination paper No. 13 after nomination paper No. 14 he would have accepted it as it contained no error regarding the name or electoral number and as the names of the proposer and the seconder in that nomination paper were different from those named in nomination paper No. 14. That the same person has subscribed more than once would only be apparent if nomination paper No. 9 be taken up after nomination paper No. 14. These facts justify the petitioner in challenging the bona fides of the returning officer. I hold, therefore, that he is a necessary party and in the circumstances of this case I am of opinion that he should pay the costs of this application personally. I see no reason why the ratepayers' money should be spent when the conduct of the returning officer has been indefensible. The respondent Noor Mahomed is also liable to pay the costs of this application. The election is accordingly set aside with costs against both the respondents. The costs will be as of a hearing.

R.K.

Order accordingly.

2. (41) 28 A. I. R. 1941 Cal. 130 : I. L. R. (1940) 2 Cal. 230, Mahomed Hossain v. Mahomed Raffique.

A. I. R. (31) 1944 Calcutta 401**BISWAS AND LATIFUR RAHMAN JJ.***Bazler Rahman Khandakar—Petitioner*
v.*Amiraddin and, on his death, his sons*
Apsaraddi and others—Opposite Party.

Civil Rule No. 999 of 1943, Decided on 4th July 1944, for setting aside order of Addl. Dist. Judge, Tippera (Comilla), D/- 31st March 1943.

(a) Bengal Agricultural Debtors Act (7 of 1936), S. 40A—"Court"—Meaning of — District Judge acting under S. 40A is "Court."

A Court must be a judicial tribunal, that is to say, a tribunal charged with judicial functions to be exercised judicially. The meaning of the word "judicial" in this context is best understood by contrasting it with "administrative" though an administrative body may also be clothed with judicial functions and act judicially. But there is a great difference between the constitution of Courts and that of bodies which are really administrative, though in deciding the questions before them they may have to act judicially in the sense of acting fairly and impartially : (1892) 1 Q. B. 431; 1931 A. C. 275 ; 1935 A. C. 76 and 1938 A. C. 415, *Approved*. [P 403 C 2]

There is no real antithesis between the expressions "persona designata" and "Court;" even a persona designata may be a Court: that will depend upon his powers and functions and upon the provisions of the statute conferring jurisdiction on him: (41) 28 A.I.R. 1941 Pat. 65 (F.B.), *Rel. on*. [P 403 C 1, 2]

The District Judge exercising jurisdiction under S. 40A is a "Court." The fact that the Legislature has not thought it fit to designate the District Judge specifically as a Court by using any such expression as "the District Court" or "the Court of the District Judge," instead of saying "the District Judge" is of no importance. As these expressions might be regarded as interchangeable, it would not be unreasonable to say that in using the words "District Judge" in S. 40A the Legislature meant to say the "District Court" or the "Court of the District Judge:" 63 Cal. 136, *Rel. on*. [P 404 C 2]

(b) Civil P. C. (1908), Ss. 115 and 96 — Special jurisdiction conferred on existing Court — Its decisions are subject to revision or appeal if provided by statute.

Where special jurisdiction is conferred on an existing or established Court without more, it will attract all the incidents of the ordinary jurisdiction of such Court including the right of revision as much as the right of appeal from its decisions, if provided by statute : 1913 A. C. 546, *Rel. on*. [P 405 C 1]

(c) Bengal Agricultural Debtors Act (7 of 1936), S. 40A — District Judge acting under S. 40A is Court subordinate to High Court within S. 115, Civil P. C.

The District Judge exercising jurisdiction under S. 40A, Bengal Agricultural Debtors Act, is a Court subordinate to the High Court within the meaning of S. 115, Civil P. C., and is, therefore, amenable to the revisional jurisdiction of the High Court under S. 115, Civil P. C. [P 405 C 1; P 407 C 1]

(d) Bengal Agricultural Debtors Act (7 of 1936), Ss. 20, 18 and 3 (10)—Scope of S. 20 — Power of board to decide whether transaction is loan — Transaction whether mortgage by conditional sale or out and out conveyance with condition of repurchase — Board is competent to decide question.

Section 20 is not exhaustive of the matters which a board might or might not decide. There are various
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questions besides those specifically mentioned in that section which a board is not only competent, but is required to decide under the Act. Thus, S. 18 provides that if there is any doubt or dispute as to the existence or amount of any debt, the board shall decide whether the debt exists and determine its amount. Again the definition of a "loan" in S. 3 (10) is expressly stated to include "any transaction which is, in the opinion of a board, in substance a loan." This clearly shows that where there is any question as to whether a transaction is a loan or not, it is for the board to come to a conclusion in the matter upon consideration of all the attendant facts and circumstances. The question whether a transaction is a mortgage by conditional sale or an out and out conveyance with a condition for repurchase involves the decision whether the transaction is a loan or not and the board is competent to decide the same. [P 405 C 1,2]

(e) Bengal Agricultural Debtors Act (7 of 1936), Ss. 20 and 18—Question as to existence of liability—Board is competent to decide.

The power under S. 20 to decide whether a liability is a debt or not, must necessarily include the power to decide whether or not there is a liability. The two questions may not be quite the same, but the first involves the second, and where therefore there is any doubt or dispute as to the existence of a liability, this must be first determined before and as a preliminary to the determination of the further question as to the nature of the liability. Apart from this, a question as to the existence of a liability comes within the terms of S. 18, which expressly empowers a board to decide whether a debt exists or not. Every liability may not be a debt, but every debt is a liability, and jurisdiction to decide that there is a debt implies jurisdiction to decide that there is a liability. [P 405 C 2]

(f) Bengal Agricultural Debtors Act (7 of 1936), Rules under, R. 22 — Transfer of debtor's application by Collector under R. 22 to ordinary board within whose jurisdiction debtor not ordinarily resident — Transfer is incompetent.

The transfer of the debtor's application by the Collector under R. 22 to the ordinary board within whose jurisdiction the debtor was not ordinarily resident is incompetent and the proceedings before that board must be held to be without jurisdiction. [P 406 C 1]

(g) Bengal Agricultural Debtors Act (7 of 1936), S. 8 — Application by debtor not to ordinary board but to special board having jurisdiction — Competency of.

The debtor was ordinarily resident at a place called Chaudagram within the Comilla sub-division, but instead of applying to the Ordinary Debt Settlement Board established for that area he made the application before the Special Board at Laksam which had jurisdiction over the whole of the sub-division :

Held that no objection could be taken as to the place of presentation of the application, as the Special Board at Laksam had jurisdiction over the whole of the sub-division. [P 406 C 1]

Upendra Kumar Roy and Abani Kanta Roy —
for Petitioner.

Dr. Sarat Chandra Basak, Sushil Chandra
Dutta and Amiya Kumar Som —
for Opposite Party.

Biswas J.— This is a rule against a revisional order of the District Judge of Tippera under S. 40A, Bengal Agricultural Debtors Act, 1935, and arises out of an application made by the petitioner under S. 8 of the Act for settlement of his debts. The petitioner was ordinarily

resident at a place called Chauddagam within the Comilla sub-division, but instead of applying to the Ordinary Debt Settlement Board established for that area, he made the application before the Special Board at Laksam which had jurisdiction over the whole of the sub-division. The Special Board thereupon submitted the application to the Collector (S. D. O., Comilla) under R. 22, Bengal Agricultural Debtors Rules, 1936, and that officer directed a transfer of the case to the Ordinary Board at Batisha, though the petitioner did not reside in this area.

The petitioner's case was that on 17th Falgun 1331 B.S. (1st March 1925) his father on his own behalf and as guardian of the petitioner who was then a minor, jointly with the petitioner's two adult elder brothers, purported to execute a deed of sale in respect of certain properties in favour of three persons who are now represented by the opposite parties. The consideration for the transaction was stated to be sum of Rs. 5400 out of which Rs. 900 only was paid in cash and the balance was set off against a pre-existing mortgage debt of Rs. 4500 on these very properties, Rs. 3000 being due on account of principal and Rs. 1500 on account of interest. On the same date the purchasers executed a document in favour of the vendors agreeing to re-convey to them the properties if they paid back the said sum of Rs. 5400 to the purchasers within five years. The petitioner maintained that the two documents stood together, and their effect was to make the transaction a mortgage by conditional sale, creating the relationship of debtor and creditor between the parties. It was on this basis that the petitioner made his application before the Debt Settlement Board, claiming that the debt had been fully satisfied by the mortgagees' possession for over 15 years.

Previously, it appears, an application had been made in respect of the self-same transaction by one of the petitioner's brothers to the Debt Settlement Board at Chuaddagam, but that board dismissed the application under S. 17, holding that the question whether the transaction amounted to a mortgage by conditional sale or to an out and out conveyance with a condition for re-purchase was too complicated a question for the board to decide. On the present application, the Batisha Board, however, went into the matter and held that the transaction was a mortgage, and on the merits it not only accepted the petitioner's contention that the debt had been extinguished by the mortgagees' possession, but went further and found that a sum of Rs. 1080 was due by the mortgagees to the mortgagors. The board accordingly allowed the application.

Against this order the opposite parties pre-

ferred an appeal to the appellate officer (S. D. O., Comilla) under S. 40 of the Act. As the appeal was filed beyond the period of 30 days prescribed by sub-s. (2) of S. 40, the appellate officer held that he was precluded from interfering with the board's finding regarding the nature of the transaction, but subject to that, he set aside the order on the ground that the opposite parties had not been served with the requisite notices under S. 13 (1), and in the result, remanded the case for rehearing after due service of notice on the parties. The remand was, however, directed not to the Batisha Board from which the appeal had been brought, but to the Special Board at Laksam, presumably because it was considered that the Batisha Board had no territorial jurisdiction. An express direction was given to the Special Board to treat the transaction between the parties as a debt. The opposite parties were aggrieved not so much by the order of remand as by the direction which accompanied it. They accordingly moved the District Judge of Tippera in revision under S. 40A of the Act. Under the proviso to the section the District Judge transferred the case to the Additional District Judge for disposal.

The learned Judge was of opinion that the fundamental question in the case was whether or not the documents of 17th Falgun 1331 B.S., on which the petitioner relied, created a liability at all, and that this was a matter which the board was not competent to decide. Section 20 of the Act, as amended empowered the board to decide whether a liability was a debt or not, but this pre-supposed the existence of a liability in the nature of a debt. Where, therefore, the existence of a liability was in dispute, it was beyond the jurisdiction of the board to determine that question. In this view of the matter, the Additional District Judge set aside the order of the appellate officer, and directed him to instruct the board to dismiss the application.

The learned Judge further pointed out that in so far as the board had exceeded its jurisdiction, its action amounted to an "abuse of its powers" under cl. (d) of sub-s. (1) of S. 40, and that consequently no question of limitation could arise as regards the appeal. Apparently he took the view that sub-s. (2) of the section which prescribed the period of limitation applied, as its terms showed, only to an appeal against a "decision," "order," "award" or "certificate" referred to in sub-s. (1), that is to say, to an appeal which came under cl. (a) or (b) or (c), but not under cl. (d) of this subsection. It is against this order of the Additional District Judge that the petitioner has obtained the present rule.

Dr. Basak on behalf of the opposite parties

has raised a preliminary objection to the competency of the rule on the ground that the District Judge (including therein the Additional District Judge to whom the case may be transferred) exercising his powers under S. 40A is not a Court, and hence not subject to the revisional jurisdiction of the High Court under S. 115, Civil P. C. It is contended that the District Judge is a mere *persona designata*, and that the proceedings before him are not of a judicial character. Stress is laid in this connexion on the provisions contained in sub-s. (4) which expressly enjoin that the District Judge shall not hear the parties or any person appearing on their behalf, and this, it is said, takes away one of the essential attributes of a judicial proceeding. The question raised is not free from difficulty, but is now covered by authority. There are at least two reported decisions of this Court in which a contrary view has been taken: one is that of Henderson J. sitting singly, in I.L.R. (1942) 2 Cal. 478,¹ and the other, of a Division Bench (Mukherjea and Blank JJ.) in 47 C. W. N. 473.²

Dr. Basak asks us to hold that the decisions are wrong, and if necessary, to refer the matter to a Full Bench. It is said that the question has not been discussed with sufficient fulness in either of these judgments, and in particular, that the effect of sub-s. (4) of S. 40A has not been considered. The only test which is accepted as conclusive for showing that the District Judge is a Court is the power which he has been given under the proviso to transfer the case to any Additional District Judge subordinate to him, the ratio being that the District Judge can have no judicial officer subordinate to him except as a Court. The learned Judges appear to have paid little regard to the scheme of the Act which definitely contemplates the setting up of a special machinery for carrying out its provisions in which civil Courts have no place. We have carefully considered the matter, and are not prepared to say that the decision arrived at in the two cases referred to is not correct. What are the questions which really arise for consideration? They are mainly two: first, whether the District Judge in S. 40A is a Court, and secondly, whether he is a Court subordinate to the High Court within the meaning of S. 115, Civil P. C.?

The first question is not answered by saying that the District Judge is a *persona designata*, for as Fazl Ali J. points out in the Patna Full Bench case, 20 Pat. 373³ at p. 388, there is no real antithesis between the expressions "*persona*

designata" and "Court;" even a *persona designata* may be a Court: that will depend upon his powers and functions and upon the provisions of the statute conferring jurisdiction on him.

The second question is the more important of the two, for, even if the District Judge is a Court, it does not necessarily follow that he must be a Court subordinate to the High Court. The Civil Procedure Code contains no definition of a Court, but S. 3 provides for the subordination of Courts for the purposes of the Code. It lays down that for the purposes of the Code, the District Court is subordinate to the High Court, and every civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court and District Court. That makes it necessary to consider whether the District Judge referred to in S. 40A is the District Court, by "District Court" being meant, as S. 2 (4) of the Code shows, the principal civil Court of original jurisdiction, or in the language of the Bengal, Agra and Assam Civil Courts Act (12 of 1887), the Court of the District Judge. That is not all: we have further to ask whether in exercising the jurisdiction conferred on him by S. 40A the District Judge functions as such Court.

First, then, as to whether the District Judge is a Court. We shall not attempt the difficult task of defining a Court, or laying down exhaustively the tests by which to differentiate a Court from a body which is not a Court. Suffice it to state that a Court must be a judicial tribunal, that is to say, a tribunal charged with judicial functions to be exercised judicially. The meaning of the word "judicial" in the present context is perhaps best understood by contrasting it with "administrative." We are not unmindful of the fact which is now well established that an administrative body may also be clothed with judicial functions and act judicially: (1892) 1 Q. B. 431,⁴ (1931) A.C. 275,⁵ (1935) A.C. 76⁶ and (1938) A.C. 415.⁷ But there is a great difference between the constitution of Courts and that of bodies which are really administrative, though in deciding the questions before them they may have to act judicially in the sense of acting fairly and impartially.

Turning to the provisions of S. 40A, Bengal Agricultural Debtors Act, there can hardly be any doubt that the functions and powers which are thereby conferred on the District

1. (43) 30 A. I. R. 1943 Cal. 250 : I. L. R. (1942) 2 Cal. 478, Hari Pada Datta v. Ram Sristi Kundu.

2. (43) 30 A.I.R. 1943 Cal. 470 : 47 C. W. N. 473, Gobinda Chandra v. Rashmani.

3. (41) 28 A.I.R. 1941 Pat. 65 : 20 Pat. 373 (F.B.), Mt. Dirji v. Sm. Goalin.

4. (1892) 1 Q. B. 431, Royal Aquarium, etc., Ltd. v. Parkinson.

5. (1931) 1931 A. C. 275, Shell Co. of Australia v. Federal Commissioner of Taxation.

6. (1935) 1935 A. C. 76, O'Connor v. Waldron.

7. (1938) 1938 A. C. 415, Toronto Corporation v. York Corporation.

Judge are judicial, and not administrative. The word "revision" is perhaps inconclusive, and so also the provision in sub-s. (4) that he shall "consider" the papers which may be forwarded to him by the appellate officer, particularly as it is coupled with the condition that he "shall not hear the parties or any person appearing on their behalf." Sub-section (5), however, seems to us to leave the matter in no uncertainty: it expressly requires that the District Judge is to satisfy himself whether there has been a "substantial failure of justice," and that, "by reason of any illegality or irregularity" in the order under revision, which clearly implies a judicial determination by the application of a judicial mind. The duties imposed are in fact not very dissimilar to those which this Court is empowered to discharge under the provisions of S. 115, Civil P. C. The fact that the District Judge has been given power to act "for any other sufficient cause" does not appear to us in any way to alter the scope or nature of the jurisdiction he exercises under this section. These words are to be read as *ejusdem generis* with the grounds specifically mentioned in the preceding clause.

If, then, the functions are judicial, can it nevertheless be said that they have been entrusted to the District Judge, not as a Court, but as an administrative authority? The District Judge is undoubtedly a judicial officer who has to perform certain administrative business in the course of his official duties, but there is nothing to show that the jurisdiction under S. 40A has been conferred upon him in his administrative, and not in his judicial capacity. That under the terms of sub-s. (4) the District Judge has no right to hear the parties does not appear to be of any decisive significance in this respect. That is a mere matter of procedure, and cannot in our judgment affect his capacity to act as a Court. It is unquestionably one of the normal characteristics of a judicial proceeding that it must be conducted in the presence of the parties concerned, but that is not a necessary test. If that was so, a Judge of this Court, for instance, could not dispose of an undefended criminal appeal without ceasing to be a Court. Between deciding without hearing the parties and deciding without a right to hear the parties, there is a difference, but the difference is only one of degree as regards procedure, which can make no difference as to the character in which the tribunal acts, making it judicial in one case and administrative in the other.

It is pertinent in this connexion to call attention to S. 4, Civil P. C., which clearly shows that it is possible by enacting a special law to prescribe a special form of procedure for any civil Court in derogation of that laid down in

the Code. Sub-section (4) of S. 40A, to the extent to which it alters the ordinary procedure regarding the hearing of parties, may well be regarded as such special law, and cannot, therefore, be taken as necessarily affecting the character of the District Judge as a Court. We do not think there is anything in the scheme of the Act which requires us to hold that the District Judge must be an administrative tribunal. It may well have been the intention of the Legislature to provide for the review of administrative decisions by a judicial tribunal in the last resort. Section 40A was not in the Bengal Agricultural Debtors Act, 1935, as originally passed, but the actual working of the Act may have disclosed the necessity or desirability for some sort of judicial control, however limited, over the proceedings of the *ad hoc* tribunals which the original Act had set up. In so far therefore as S. 40A was intended to provide for such control, it could not be said that its enactment necessarily involved any repugnancy to the general scheme of this special legislation. It is significant that whereas in the case of a board and of an appellate officer the Act expressly provides that the proceedings before them shall be in accordance with rules to be prescribed by the Provincial Government, there is no such provision as regards the procedure to be followed by the District Judge under S. 40A, showing thereby to our mind that the procedure is to be that of an ordinary civil Court, except only as otherwise provided in the section itself.

It seems to us to be of no importance that the Legislature has not thought it fit to designate the District Judge specifically as a Court by using any such expression as "the District Court" or "the Court of the District Judge", instead of saying "the District Judge." In 63 Cal. 136=39 C.W.N. 971,⁸ dealing with a similar question in connexion with the Bengal Municipal Act, 1932, Henderson and Khundkar JJ. pointed out that these expressions might be regarded as interchangeable. It would not be unreasonable therefore to hold that in using the words "District Judge" in S. 40A of the present Act, the Legislature meant to follow the same interpretation of these words as had been adopted by the Court in that case. For the foregoing reasons, our considered answer to the first question arising upon the preliminary objection to the rule is that the District Judge exercising jurisdiction under S. 40A is a Court. Then, as to the second question whether the District Judge is subject to the revisional jurisdiction of the High Court, it should be clear from what has been already

8. ('36) 63 Cal. 136 : 39 C.W.N. 971, Naranarayan Mandal v. Aghorechandra Ganguli.

stated that if the District Judge under S. 40A is a Court, he is a Court not in his administrative capacity, nor as a *persona designata*, but as the Court of the District Judge or District Court, vested no doubt with a new and special jurisdiction under the provisions of a special statute. The only point therefore which requires consideration is whether or not in the exercise of such special jurisdiction the District Judge will be subject to the same incidents of procedure as attach to his ordinary jurisdiction. On this question it is not necessary to do more than cite the House of Lords decision in (1913) A. C. 546,⁹ which is clear authority for the proposition that where special jurisdiction is conferred on an existing or established Court without more, it will attract all the incidents of the ordinary jurisdiction of such Court, and it need hardly be added that such incidents will include the right of revision as much as the right of appeal from its decisions, if provided by the statute. We have no hesitation, therefore, in holding that the District Judge exercising jurisdiction under S. 40A, Bengal Agricultural Debtors Act, must be regarded as much amenable to the revisional jurisdiction of the High Court under S. 115, Civil P. C., as when functioning in his usual capacity. The preliminary objection to the competency of the rule must consequently be overruled.

Now, as to the merits, the question is whether the learned Additional District Judge was right in holding that the Debt Settlement Board had no jurisdiction to decide whether the transaction between the parties amounted to a mortgage by conditional sale or to an out and out conveyance with a condition for re-purchase. The learned Judge seemed to think that this involved the determination of a question as to the existence of a liability in the nature of a debt, as distinguished from the question whether a liability was a debt or not, and that under the terms of S. 20 of the Act it was only a question of the latter, and not of the former, description that a Debt Settlement Board was competent to decide. We do not think the learned Judge took a correct view of the matter. In the first place, he made a wrong assumption that S. 20 was exhaustive of the matters which a board might or might not decide. That is not so. There are various questions besides those specifically mentioned in that section which a board is not only competent, but is required, to decide under the Act. Thus, S. 18 provides that if there is any doubt or dispute as to the existence or amount of any debt, the board shall decide whether the debt exists and determine its

amount. Take, again, the definition of a "loan" in S. 3 (10), which is expressly stated to include "any transaction which is, in the opinion of a board, in substance a loan." This clearly shows that where there is any question as to whether a transaction is a loan or not, it is for the board to come to a conclusion in the matter upon consideration of all the attendant facts and circumstances. The question in the present case is really one of this kind. Rightly or wrongly, the petitioner here came to the board with the case that the sum which his father and his cosharers had received from the opposite parties was not the purchase price of a property sold and delivered to the latter, but merely a loan advanced to them on the security of that property. That being so, it would certainly be within the competence of the board, under the definition, to form an opinion as to whether this was the real character of the transaction.

Secondly, we think the learned Judge placed too narrow an interpretation on the terms of S. 20. It seems to us that the power to decide whether a liability is a debt or not, must necessarily include the power to decide whether or not there is a liability. The learned Judge may be right in thinking that the two questions are not quite the same, but the first involves the second, and where therefore there is any doubt or dispute as to the existence of a liability, this must be first determined before and as a preliminary to the determination of the further question as to the nature of the liability. To give effect to the view of the learned Judge would in fact be to render the provisions of the whole Act nugatory, for, if he is right, it should be possible in every case to defeat an application by merely asserting that there is no liability, and thereby ousting the jurisdiction of the board. We do not think there is anything in the language of S. 20 which compels us to adopt a construction which involves such a result. Apart from this, we do not see why a question as to the existence of a liability cannot be held to come within the terms of S. 18, which expressly empowers a board to decide whether a debt exists or not. Every liability may not be a debt, but every debt is a liability, and jurisdiction to decide that there is a debt implies jurisdiction to decide that there is a liability.

As to whether a transaction is a mortgage or a sale, this may be, and very often is, a very difficult question even for a civil Court to decide, and such a question should not perhaps be left to the determination of a lay tribunal like a Debt Settlement Board, but that is a matter of policy which it is not for us to enter into. We have to interpret the

⁹. (1913) 1913 A. C. 546, *National Telephone Co. Ltd. v. Postmaster General* (No. 2).

statute as it stands, and give effect to such interpretation, however much we may regret the result which it leads to. The result is that in so far as the learned Additional District Judge held that the question which the board was called upon to decide in this case was beyond its jurisdiction we must overrule his decision. We must equally set aside his decision on the question of limitation, as it was rested on the same ground. The effect of this should be to make the original decision of the Batisha Debt Settlement Board as to the transaction being a mortgage final between the parties.

Dr. Basak however on behalf of the opposite parties raised an argument, though for a different purpose, which, in our opinion, helps to avoid this result. The point he sought to make was that if the order of the District Judge directing the dismissal of the petitioner's application could not be supported on the particular ground he had mentioned, the application was still liable to be dismissed on the ground that the Batisha Board had no territorial jurisdiction to deal with the case. As will appear from the recital of facts already given the petitioner had presented his application before the Special Board at Lak-sam, but the S. D. O., Comilla, acting as the Collector, transferred it to the ordinary Board at Batisha for disposal. This transfer was made under R. 22, but the rule requires that the transfer should be made to an ordinary board having jurisdiction in the area in which the debtor is ordinarily resident. It is in the following terms:

"When an application is made under sub-s. (1) or (2) of S. 8 to a Special Board by or relating to a debtor ordinarily resident in an area for which an ordinary board also has been established, such Special Board shall submit the application to the Collector with a view to its transference to the ordinary board for action under S. 12."

Admittedly the petitioner was not ordinarily resident within the jurisdiction of the Batisha Board, but was a resident of Chauddagam which had a board of its own. The transfer to the Board at Batisha might therefore be regarded as incompetent. No objection could however be taken as to the place of presentation of the application, as the Special Board at Lak-sam had jurisdiction over the whole of the sub-division. There is no reason therefore why the application should be thrown out altogether as incompetent, as contended for by Dr. Basak. The only effect of the learned advocate's argument would be to remove the obstacle on the ground of limitation which might otherwise have operated in his clients' favour. The whole of the proceedings before the Batisha Board must in fact be held to have been without jurisdiction.

We think that in the circumstances of the case the proper order for us to make would be to set aside the order of the Additional District Judge, and remit the case to him in order that he might in his turn remit it to the appellate officer with liberty to that officer either to decide the case himself on the merits or to refer it to a competent board with territorial jurisdiction to hear it *de novo*. The rule is accordingly made absolute with costs, hearing fee three gold mohurs.

Latifur Rahman J. — Having regard to the fact that the questions raised in this rule are of some importance I should like just to say a few words. As regards the preliminary objection that the District Judge acted merely in the capacity of a superior executive officer and not as a Court, and consequently his orders were not revisable under S. 115, Civil P. C., the following observations of Mukerjea and Blank JJ. in *I. L. R. (1943) 2 Cal. 272*,¹⁰ may be referred to:

"It is only a legislative enactment or a rule having statutory authority that can constitute a Court or invest a Judge with authority to determine matters outside his jurisdiction. The Bengal House Rent Control Order, 1942, is an order made by the Governor in the exercise of his powers under R. 81 (2) (bb), Defence of India Rules. It is not a case of the exercise of legislative powers by the Governor as contemplated by Ss. 88 to 90, Government of India Act, 1935. It is an instance of an executive act pure and simple."

The Bengal Agricultural Debtors Act (Bengal Act 7 of 1936), it is to be noted, is a legislative enactment passed by the Provincial Legislature having obtained the previous sanction of the Governor-General under sub-s. (3) of S. 80A, Government of India Act, 1935. With regard to the general nature of the Act, Ameer Ali J. in *42 C. W. N. 481*,¹¹ observed as follows:

"There is a separate set of Courts created for the decision of civil claims against a certain class of persons, a certain class of prospective defendants. It is not exactly a subordinate system: it is a parallel system. I know nothing precisely analogous to it. Possibly the jurisdiction of ecclesiastical Courts over clergy might form an analogy."

Under the provisions of S. 40A of the Act, the District Judge is invested with the authority to revise orders passed by appellate officers who are appointed under the provisions of S. 40. Simply because a certain procedure is laid down under S. 40A in accordance with which he "shall not hear the parties or any person appearing on their behalf," it does not necessarily follow that he is vested with the powers of an executive officer pure and simple or is a "persona designata". Since we hold

10. ('43) 30 A.I.R. 1943 Cal. 247 : *I. L. R. (1943) 2 Cal. 272*, Kiron Chandra v. Kali Das.

11. ('38) 25 A.I.R. 1938 Cal. 455 : *42 C.W.N. 481*, Baijnath Tamakuwala v. Tormull.

that the District Judge, exercising jurisdiction under S. 40A is a Court, it follows that he is amenable to the jurisdiction of the High Court, under the provisions of S. 115, Civil P. C., and the preliminary objection accordingly fails. As to the merits, the learned Additional District Judge appears to have taken an erroneous view. Section 18 (1) of the Act runs as follows:

"If there is any doubt or dispute as to the existence or amount of any debt, the board shall decide whether the debt exists and determine its amount:

Provided . . . decree."

Section 20 is as follows:

"If any question arises in connexion with proceedings before a board under this Act, whether a person is a debtor or not, or whether a liability is a debt or not the board shall decide the matter."

These sections require the board to adjudicate on the question as to whether a liability is a debt or not. Since the board is empowered to decide the question as to the existence of a debt, and whether a liability is a debt or not, it seems that it should have the power to decide the question as to whether a transaction amounts to a debt or liability. I agree with my learned brother that this rule should be made absolute.

G.N.

Rule made absolute.

A. I. R. (31) 1944 Calcutta 407

DERBYSHIRE C. J. AND LODGE J.

Hatemali Jamadar and others

Petitioners

v.

Emperor.

Criminal Misc. Nos. 251, 285, 286, 287 and 288 of 1943, Decided on 27th March 1944.

Criminal trial — Government departments should not suggest District Magistrate or trying Magistrate as to what they should do.

For Government Departments to suggest to the District Magistrate what they and trying Magistrate should do in regard to cases under trial (unless they are specifically authorised by the Code of Criminal Procedure as for instance under S. 528 (3) to withdraw a case from a trying Magistrate) is wrong. If Government desires to put in a request to the Court trying a case the proper course is to do so directly through the Public Prosecutor who is the proper officer to put the matter before the Court. It is wrong to send instructions as to what should be done with regard to a case through the District Magistrate. [P 408 C 2; P 410 C 2]

S. C. Talukdar and N. C. Talukdar —
for Petitioners.

J. N. Majumdar — for the Crown.

Derbyshire C. J. — The rule in Criminal Miscellaneous Case No. 251 of 1943, and the connected rules in Criminal Miscellaneous Cases Nos. 285, 286, 287 and 288 of 1943, were issued at the instance of the accused upon the District Magistrate of Bakarganj to show cause why the case pending against the petitioners should not be transferred from the

Court of Mr. S. K. Roy, a Magistrate of the First Class at Barisal, to some other Court. It appears that the petitioner in Criminal Miscellaneous Case No. 251 of 1943, Khan Sahib Hatemali Jamadar, is the Chairman of the Matberia Debt Settlement Board within the Pirojpur Sub-Division of the Bakargang District. A report being made that there had been misappropriation in connexion with court-fees in the Debt Settlement Board at Matberia an investigation was ordered and ultimately a charge-sheet was submitted against Khan Sahib Hatemali Jamadar and the other petitioners. After the charge-sheet was submitted the Circle Inspector reported that the accused persons are influential persons and included a local member of the Legislative Assembly the present accused and recommended that the case be transferred from Pirojpur Sub-Division to the District head quarters at Barisal. The District Magistrate without hearing any of the accused persons passed an order transferring the case from Pirojpur to the file of Mr. S. K. Roy, a Magistrate of the First Class at Barisal. Mr. S. K. Roy is a Munsif Magistrate taking criminal cases at Barisal and it was for this reason that Mr. Palmer, the District Magistrate, selected him to try the case. After the charge-sheet was received the Magistrate decided to split the cases up into three different cases, and 9th July was fixed as the first date of hearing. On that date an application for an adjournment was filed on behalf of Khan Sahib Hatemali Jamadar on the ground that this accused had fallen ill in Calcutta where he had gone to attend the Legislative Assembly. The Magistrate adjourned the case until the following day but observed that he had to be satisfied with regard to the fact of illness and warned the accused that serious notice would be taken of his absence if the plea of sudden illness put forward as a ground of adjournment were not substantiated by a proper medical certificate. On the following day apparently in consequence of a statement made to the Magistrate, the Magistrate directed that a letter be written to the Secretary, Bengal Legislative Assembly, to ascertain whether Khan Sahib Hatemali Jamadar had attended the sittings of the Assembly on 8th, 9th and 10th July.

On 5th August 1943, to which date the hearing of the case was adjourned Khan Sahib Hatemali Jamadar appeared before the Magistrate and produced a medical certificate. At the same time a letter from the Secretary to the Legislative Assembly was read in which it was stated that this accused attended the sittings of the Assembly on 8th and 9th July. In view of this statement the Magistrate directed Khan Sahib Hatemali Jamadar to

explain how he could attend the Assembly sittings in view of the medical certificate. On 6th August, the accused filed a petition explaining the circumstances. The explanation was accepted but the Magistrate observed that "a serious view will be taken if in future the case has to be adjourned owing to the absence of the accused away at other places."

Thereafter the trial proceeded. Khan Sahib Hatemali Jamadar moved this Court on 20th September 1943, for a rule on the ground that the District Magistrate had no justification for transferring the case to the Barisal Head Quarters and further that Mr. S. K. Roy had shown prejudice in refusing to accept the medical certificate of the petitioner, when application was made for an adjournment. The other rules were obtained on 8th November 1943. In reply to the rule the District Magistrate submitted an explanation. He observed (*inter alia*) as follows :

"As the principal accused was a prominent public man, well-known to the Executive Officers in Pirojpur, I felt that the case should be transferred to Barisal and I selected Mr. S. K. Roy to try the case as he is a Munsif (that is to say, a member of the Judicial Service and not the Executive) who is temporarily doing magisterial work. I felt that he would be entirely free from any suspicion of Executive influence whether on behalf of the police or on behalf of the accused.

Since the commencement of this case I have received numerous letters from the Co-operative Credit and Rural Indebtedness Department of the Government of Bengal, suggesting that the case should either be withdrawn or postponed. I have refused to comply with any of these requests. The letters and telegrams are in my possession and can be produced for the inspection of the High Court if desired. From these letters and telegrams I have formed the impression that the accused is making use of his influence as an M.L.A. to attempt to have the prosecution stifled."

In view of this statement a letter was written to the District Magistrate directing him to forward to this Court all the letters and telegrams which he had received from the Co-operative Credit and Rural Indebtedness Department of the Government of Bengal suggesting that the case should either be withdrawn or postponed. Accordingly, a bundle of letters and telegrams were forwarded to this Court. On receipt of these letters and telegrams we requested the standing counsel to appear on behalf of the Government and gave him and the advocate for the petitioner copies of the correspondence. Since the receipt of these letters, Mr. Palmer has been transferred from Bakarganj to another district. (After setting out the letters his Lordship proceeded.) Mr. Hill's letters clearly created the impression in Mr. Palmer's mind that an attempt was being made to hold up or stop the prosecution. The letters certainly are liable to that interpretation. The standing counsel, however, contends that that was not the Government's intention; that the Gov-

ernment's intention was not to interfere with the course of justice. He stated in Court that on 13th May, a written application was made by the present applicant to the Minister in charge of the Department alleging that he had been falsely implicated in a defalcation case and that no sanction had been obtained for his prosecution and asked for the intervention of the Government. It is interesting to note that on the hearing of this rule the advocate for the accused stated that the accused had no knowledge of the letters. Section 197, Criminal P. C., provides :

"... when any public servant who is not removable from his office save by or with the sanction of a Provincial Government or some higher authority, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Local Government."

The standing counsel contends that by reason of the provisions of S. 49, Bengal Agricultural Debtors Act, the applicant is a public servant and that when the applicant's application was received by the Government Department and it was found that no sanction had been obtained, that the Government put the matter before the legal remembrancer and various opinions were obtained and rulings cited, and the question was considered as to whether there was any necessity to obtain sanction; but there were conflicting rulings on the subject and various cases were considered and that whilst that consideration was taking place the Government desired the case to be adjourned pending consideration; that there had been difficulty in the past in working the Bengal Agricultural Debtors Act and they wished the matter to be settled and that Government consequently authorised the letters. Further, that in November Government decided that the case must proceed as it was. There was no intention whatever to interfere with the course of justice. It should, however, be noted that in the later letters, i. e., from 7th July, Mr. Hill was applying for an adjournment of the case to allow the accused to appear in the Legislative Assembly and perform his duties there. In the case in I. L. R. (1941) 2 Cal. 281¹ at p. 286 it was pointed out that if Government desired to put in a petition or request to the Court trying a case the proper course was to do so directly through the Public Prosecutor who was the proper officer to put the matter before the Court and that it was wrong to send instructions as to what should be done with regard to a case through the District Magistrate. These remarks appear to have had no effect on the

1. ('42) 29 A. I. R. 1942 Cal. 219 : I. L. R. (1941) 2 Cal. 281, *Emperor v. Md. Ebrahim*.

conduct of the Government Department in the present case and Mr. Palmer cannot be blamed for taking the view that the Government Department was improperly attempting to hold up or stop the prosecution. If the Government Department wished to ascertain what the legal position with regard to S. 197, Criminal P. C., was, it could have allowed the case to go forward and have it decided according to law. If the Government wished to give permission for the prosecution to go on, they could give it at once through the Public Prosecutor. If they wished to stop the prosecution they could instruct the Public Prosecutor to apply in open Court for its withdrawal under S. 494, Criminal P. C. They took none of these courses and Mr. Palmer's letter of 3rd July, discloses that the question of S. 197, Criminal P. C., was fully considered before the prosecution was started and the advice of the Public Prosecutor was taken. It is interesting to analyse the correspondence. It opens with a telegram on 16th May, from the Government Department to Mr. Palmer:

"Please report facts and stay proceedings if within your powers pending further instructions on sanction of prosecution from Government."

The obvious comment on that telegram is that it requests stay of proceedings at once before the Government Department had had the opportunity to study the facts of the case. Mr. Palmer's reply by letter next day was "as the case is now sub judice, I think it would be improper to interfere in any way;". . . . but statement of facts of the case would be forwarded as they were on 27th May. A month later, 24th June, is the next letter and is from the Department to Mr. Palmer marked confidential; it requests a long adjournment of the case in order that the matter may be cleared up and then raises the question of the necessity for sanction, suggests that for lack of it the prosecution may fail and that to regularise it the Public Prosecutor should withdraw the case with the consent of the Court and then the prosecution be restarted after obtaining the necessary sanction. One wonders only that it took a month to give that reply. On 5th July, Mr. Palmer replied that before the prosecution was started the question of sanction under S. 197, Criminal P. C., was considered and the advice of the Public Prosecutor taken, that there were cases in the High Court justifying prosecution without sanction and that there was no possibility of the case failing on this ground. He rejected the suggestions of Mr. Hill. The reply of Mr. Hill was curious. On 7th July, he sent a telegram and a letter suggesting a short adjournment or that the personal attendance of the accused should be dispensed with at

the next hearing so that accused could attend the meeting of the Legislative Assembly. In the letter he also said he was taking legal advice on the question of sanction. The latter statement is interesting because the standing counsel in Court before us referred to the file in the matter and stated that on 20th May, the matter was referred to the Legal Remembrancer for opinion which opinion the Legal Remembrancer gave on 11th June. Surely Mr. Hill must have known that. In view of this it is difficult to see why Mr. Hill should write on 24th June:

"I am directed to request that a long adjournment of the case should be arranged so that the matter may be cleared up,"

and on 7th July, that he was taking legal advice on the question of sanction. Mr. Palmer's letter of 9th July in reply to Mr. Hill's of 7th July, was as downright and uncompromising as before. After that Mr. Hill dropped the matter of a long adjournment on the question of sanction under S. 197 and contented himself with asking for Mr. Palmer's cases in support of his attitude regarding section 197. Mr. Hill, however, proceeded to write the letter of 26th July, in which he stated:

"It is understood that the accused applied for an adjournment on the ground of ill health and that he remained in Calcutta in anticipation of adjournment as he had gathered the impression that the adjournment would almost certainly be granted. It is believed that he was bone fide in this and that he had not any intention of evading the process of the Court. Will you kindly inform me of the result of the application?"

That letter is interesting because on 9th July, the accused was due to appear before the Magistrate, but did not appear, his advocate stating that he had gone to Calcutta to attend the Assembly and had been taken ill there. The trying Magistrate observed that that day, 9th July, had been fixed after consulting all the accused and their lawyers and that the accused had not produced any medical certificate. The trying Magistrate ordered the accused to produce a medical certificate. On 11th July, the trying Magistrate fixed the date for the appearance of the accused as 5th August, and ordered that the accused's medical certificate should be produced on that day; the Magistrate directed that the Secretary of the Legislative Assembly be written to asking whether the accused had attended there on 8th, 9th and 10th July. The Secretary of the Legislative Assembly wrote back that the accused had attended the Legislative Assembly on 8th and 9th July. Mr. Hill's letter of 26th July, was written to Mr. Palmer a little over a week before the trying Magistrate was due to take up again the case against the accused and was obviously intended to help to get the accused out of the difficulties

he was involved in because of his non-appearance on 9th July. It is a letter written on behalf of the accused by a Government Department. Mr. Palmer gave a very terse reply in para. 1 of his letter of 29th July :

"I understand that the accused was granted an adjournment but that he has been asked to produce a medical certificate in support of his alleged ill health."

On 5th August, the hearing was adjourned to 6th August, and on 6th August, when as stated earlier the accused offered an explanation of how he was ill in Calcutta and unable to travel to Barisal to attend Court, yet well enough to attend the Assembly sittings. The Magistrate accepted the explanation, but said that a serious view would be taken if the trial had to be adjourned again owing to the absence of the accused in another place. Thereafter on 7th and 14th August, the case was heard. On 20th September, on affirmation sworn on 17th September, the accused moved this Court for a rule for transfer under S. 526, Criminal P. C., and obtained it. On 21st September 1943, Mr. Hill again wrote to Mr. Palmer suggesting a further adjournment of the case so that the accused might attend the Assembly; but by that time the proceedings had been stayed under this rule. The rule was first heard on 9th February 1944, and then adjourned so that the standing counsel could tell us what Mr. Hill had to say about the letters. At the adjourned hearing on 29th February, the standing counsel furnished no statement by Mr. Hill but simply stated that the letters were not the personal letters of Mr. Hill but that Government took responsibility for them. Mr. Hill indeed in the letter of 24th writes "I am directed to request" Who gave those directions we have not been told. From 16th May to 3rd July 1943, the Government Department was asking for a long adjournment to clear up the position as regards sanction under S. 197, Criminal P. C. From 7th July to 21st September, the Government was asking for short adjournments to enable the accused to attend to his duties as a member of the Legislative Assembly.

As regards the May-July letters, I am unable to accept the contention that they simply asked for time so that the legal position as regards S. 197, Criminal P. C., and S. 49, Bengal Agricultural Debtors Act, should be cleared up; the position would be cleared up by simply letting the case go on and getting a decision from the Court. Besides, according to the standing counsel the Legal Remembrancer took the matter up on 26th May, and gave his opinion on 11th June, which makes the Government Department's letters of 24th June and 7th July, asking for time to consider the

legal position, look disingenuous and misleading. As regards the letters of 7th July and 21st September, asking for short adjournments to enable the accused to attend to his duties as a member of the Legislative Assembly, I must in the first place say that the proper and only way to make such a request is for the accused or his pleader to make it to the trying Court who will give it every proper consideration. For Government Departments to suggest to the District Magistrate what they and trying Magistrate should do in regard to cases under trial (unless they are specifically authorised by the Code of Criminal Procedure as for instance under S. 528 (3) to withdraw a case from a trying Magistrate) is wrong as this Court has more than once pointed out. I have come to the conclusion that an attempt was made to hold up this prosecution so that eventually it would be dropped. Clearly the accused had moved in this matter and had friends with influence who caused the Government Department to send the above letters. Who these persons were we have not been told. The Government which has taken responsibility for these letters knows or can find out who these persons were. It clearly is their duty to find out and see that this attempted interference which is not consistent with the oaths of office which the Governor and his Ministers have taken "to do right to all manner of persons according to the laws and usages of India without fear or favour," does not take place. Further it is not consistent with the duties of Secretaries of Government Departments who are officers subordinate to the Governor for the purpose of exercising the executive authority of the Province, to take part in such attempts.

Thanks to the proper and resolute attitude of the District Magistrate, there was no interference with the course of justice here. The District Magistrate, Mr. Palmer, acted properly in transferring the case to the Munsif Magistrate at Sadar — and as subsequent events have shown he was wise in doing so. The trying Magistrate, Mr. Roy, acted properly and showed both discretion and firmness in dealing with the case when the accused after agreeing to the date fixed for hearing kept away. At the conclusion of the hearing of the rule the standing counsel stated that the Government were anxious to do nothing which might even savour of interference with the course of justice. I can only repeat what has been said above and further say that when persons apply to Government Departments for their assistance in what might appear to be an interference with the course of justice in a case, the proper reply of those departments is "the matter is not for us to deal with,

it is sub judice; it is a matter for the trying Court." I see no reason to believe that the accused has not had and will not have a fair trial and in my opinion the rule for transfer should be discharged. The other rules, namely, Miscellaneous Cases Nos. 285 to 288 of 1943, are likewise discharged.

Lodge J. — I agree.

R.K.

Rules discharged.

A. I. R. (31) 1944 Calcutta 411

DERBYSHIRE C. J. AND LODGE J.

*Rajendra Nath Som — Complainant —
Petitioner*

v.

*Dwija Pada Samanta and others —
Opposite Parties.*

Criminal Misc. Case No. 38 of 1944, Decided on 27th March 1944.

Criminal P. C. (1898), Ss. 494, 528 (2) and 401 — Withdrawal — Trying Magistrate must exercise judicial discretion—Government if dissatisfied may exercise powers under S. 401—Trying Magistrate exercising judicial discretion — District Magistrate withdrawing case from Magistrate and sending to another Magistrate to achieve result desired by him is not acting according to law.

Section 528 (2) should be used in the furtherance of the interests of justice according to law and not in the frustration of it. If a District Magistrate withdraws from a trying Magistrate a case, in which the trying Magistrate is exercising his judicial discretion, on the ground that the result is not, or may not be the result that he wishes and sends it to another Magistrate for the express purpose of getting the result he desires, then it is not justice according to law. The justice according to law is for the trying Magistrate to exercise his discretion judicially. If it is wrong the superior Courts are to rectify it. If eventually the Government consider that notwithstanding the Court's decision clemency ought to be exercised, the Government may in a proper case exercise it: ('39) 26 A. I. R. 1939 Cal. 220 (S. B.) and ('34) 21 A. I. R. 1934 Cal. 137, *Rel. on.* [P 414 C 1]

Sudhansu Sekhar Mukherjee — for Petitioner.

*Deputy Legal Remembrancer (A. Ahmad) —
for the Crown.*

Derbyshire C. J. — On 2nd March 1944, at the instance of the petitioner, the complainant, this Bench issued a rule upon the District Magistrate of Burdwan to show cause why this case should not be transferred from the file of the Sub-divisional Officer at Burdwan or such other order made as the Court might think fit. The matter arose in this way. On 20th September 1943, the petitioner lodged a complaint in the Court of the Sub-divisional Officer at Burdwan alleging that the opposite parties, the accused and others had committed offences against him under Ss. 147, 325 and 395, Penal Code. The substance of the complaint was that on 18th September 1943, the accused armed with spears, lathis and other weapons trespassed into the complainant's

house and looted 50 or 60 maunds of paddy from his granary; that the complainant resisted the accused whereupon he was hit on the head and wounded, and that when he raised his hand to protect his head he was struck by one of them with a lathi with the result that his left hand was fractured. A charge sheet was submitted against the accused on 17th November 1943 and the accused were put upon their trial at Burdwan in the Court of Mr. S. Chatterji, a Munsif-Magistrate, on 29th November 1943. From then until 1st February 1944, the evidence for the prosecution was heard and finished. The accused made statements under S. 342, Criminal P. C., of the formal kind stating that they were innocent and it only remained for the defence to give evidence if they thought fit, for the advocates to address the Court and for the Court to deliver judgment. On 11th February 1944, the Court Sub-Inspector, Burdwan, put in the following written application:

"In the Court of Mr. S. Chatterji, Munsif-Magistrate, First Class, Burdwan,
Sir,

In connexion with the case noted in the margin I beg to submit as per Government instructions it has been decided by the District Magistrate in consultation with the Superintendent of Police that clemency to be shown in this case and as such it has been decided to withdraw the case.

Orders from Superintendent of Police have been received with instruction to withdraw the case from prosecution.

I pray that I may kindly be permitted to withdraw myself from prosecution in the case and the case may be disposed of accordingly under S. 494, Criminal P. C."

The complainant opposed this application in a counter-affidavit stating that the accused had entered an inner apartment of the petitioner's house, beaten him, inflicted wounds, and broken his hand for which there was no justification. The Magistrate thereupon on the same day made the following order:

"Read the petition filed by the complainant. I have not been given the grounds what prompted the D. M. or the S. P. to withdraw from the prosecution of a case against accused who appear to be all well-off. Accordingly, the prayer is rejected. Now case shall proceed. However, if the C. S. I. can satisfy the grounds of such withdrawal I am prepared to reconsider."

Thereupon the Court Sub-Inspector communicated with the Superintendent of Police, Burdwan, who in turn, communicated with the District Magistrate, who on 12th February 1944, (the next day) made the following order withdrawing the case from the trying Magistrate, Mr. S. Chatterji:

"Seen the order of the trying Magistrate dated 11-2-1944 and the endorsement of the S. P. dated 12-2-1944 on the petition of the C. S. I. It is urgent that Government order regarding clemency should be carried out.

The case is therefore withdrawn to my file and transferred to S. D. O. Sadar for favour of disposal."

On 19th February 1944, the Sub-divisional Officer at Burdwan to whose file the case had been transferred, considered the matter of withdrawal and heard the complainant's objections. The complainant intimated his intention to move this Court in the matter whereupon the Sub-divisional Officer stayed further proceedings. As stated earlier, this Court on 2nd March 1944, granted the present rule and called upon the District Magistrate to show cause why the case should not be transferred away from the Sub-divisional Officer's file. In his explanation the District Magistrate of Burdwan referred to a confidential memorandum No. 28 (28) P. S. dated Calcutta, 10th January 1944, issued by the Government of Bengal, Home Department (Political) on the subject of overcrowding in jails — review of cases of undertrial prisoners accused of offences relatable to famine conditions and also to a later confidential letter from the same department No. 137 P. S. dated Calcutta, 7th February 1944. The confidential memorandum dated 10th January 1944, reads as follows :

"To

All District Officers,

The Commissioner of Police, Calcutta.

Subject.—Overcrowding in jails—review of cases of undertrial prisoners accused of offences relatable to famine condition.

The unprecedented increase in cognizable crime caused directly by the prevalence of acute famine conditions has resulted in serious overcrowding of undertrial prisoners in the jails in this Province.

2. The situation is now improving and as an act of clemency towards persons who have committed offences as a means of self-preservation in conditions of acute famine and also as a measure of affording immediate relief from the pressure on jail accommodation and the time and labour of the officers concerned, Government have decided that the cases of all persons who have been sent up by the police for offences connected with the famine such as theft of food, clothing and other necessities committed during the last six months (even if the offence may technically have amounted to burglary, robbery etc.) should be summarily reviewed by District Magistrates, Sub-divisional Magistrates or Senior Deputy Magistrates in consultation with Superintendents of Police, and all persons who are definitely not known to be of bad character should be discharged forthwith.

3. In implementing this decision the following principles must be observed :—

(a) In deciding whether any particular person deserves the benefit of clemency the advice tendered by the Superintendent of Police should ordinarily be accepted.

(b) In case of a difference of opinion between the reviewing Magistrate and the Superintendent of Police, the District Officer should personally decide.

(c) The orders which may be passed must be legal orders made in accordance with the Code of Criminal Procedure having regard to the stage which the case under consideration has reached, and if the Magistrate cannot legally pass an order of discharge or acquittal under any appropriate section of the Code

the only course to adopt will be to request the Public Prosecutor to apply for the withdrawal of the prosecution with the consent of the Court.

(d) No formal executive order or instruction can properly be issued to a Magistrate who had already taken cognisance of a case as to the manner in which he should deal with it, but the policy of Government can be explained and the Magistrate requested to pass such legal orders as the circumstances of the case may permit.

4. Subject to these principles the detailed *modus operandi* required to give effect to the Government decision may be worked out by the District Officer in consultation with the Superintendent of Police. The arrangements for the production of materials necessary for reviewing cases will presumably be made by the Superintendent of Police with the assistance of Court Inspectors and Sub-Inspectors.

5. Government desire that necessary action to give effect to the decision should be taken immediately."

The confidential letter dated 7th February 1944 reads as follows :

"Clemency may be extended even in the case of undertrial-prisoners whose offences fall technically within the definition of dacoity if the case is otherwise covered by the instructions conveyed by Home (Political) Department Memorandum No. 28 P. S. dated 10th January 1944."

The District Magistrate in his explanation to this Court stated that he had taken the action he did in order to give effect to the Government policy of clemency as set out in the two circulars; that the offence was one relatable to famine conditions and that the accused had been in urgent need of paddy to save themselves from starvation. He further stated that the accused had previously demanded paddy by way of a loan from the complainant but he refused it and that the accused were not professionally bad characters. He also stated that he had discussed the case with the Superintendent of Police and came to the conclusion that clemency ought to be extended to the accused and issued instructions that the case should be withdrawn by the Superintendent of Police. He stated that he considered it urgent that the Government order should be carried out and therefore he had withdrawn the case to his file and transferred it to the Sub-divisional Officer, Sadar, for disposal. The Deputy Legal Remembrancer was present on behalf of the Government and this Court asked him to produce the two circulars referred to by the District Magistrate and they were thereupon produced. The Deputy Legal Remembrancer on behalf of the Government relied upon S. 523 (2), Criminal P. C., which provides as follows :

"Any Chief Presidency Magistrate, District Magistrate or Sub-divisional Magistrate may withdraw any case from, or recall any case which he has made over to, any Magistrate subordinate to him, and may inquire into or try such case himself, or refer it for inquiry or trial to any other such Magistrate competent to inquire into or try the same."

The Deputy Legal Remembrancer also relied upon S. 494 of the Code which reads :

"Any Public Prosecutor may, with the consent of the Court, in cases tried by jury before the return of the verdict, and in other cases before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and upon such withdrawal, (b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences."

The complainant, on the other hand, contended that the effect of the withdrawal of the case from Mr. S. Chatterjee and the sending of it to the Sub-Divisional Officer, Sadar, was, under the circumstances, an improper interference with the course of justice and that the case should be restored to the file of the trying Magistrate and dealt with according to law. It seems very doubtful whether the trying Magistrate knew of the circular when he made his order of 11th February 1944. As regards the circular itself, no objection can be taken to the general purpose of it. From paras. 1 and 2 it would appear that the purpose of Government was to secure the discharge of persons who, during the recent famine conditions that existed in some parts of the Province, had committed offences such as theft of food, clothing and other necessities as a means of self-preservation. From para. 3, it would appear that at first the decision as to who should get the benefit of this clemency rests with either the Superintendent of Police or the District Magistrate but that the conditions of the Code of Criminal Procedure must be complied with. When the District Magistrate and the Superintendent of Police have decided whose case should be dropped, application should be made through the Public Prosecutor, (in this case the Court Sub-Inspector) to the trying Magistrate for the withdrawal of the prosecution with the consent of the Court.

Paragraph 3 (d) makes it clear that the ultimate decision as to the withdrawal of the case rests, as indeed it must, under the Code of Criminal Procedure, with the trying Magistrate to whom the circumstances and the Government's policy must be explained. In the present case it does not appear from the petition of the Court Sub-Inspector submitted to the trying Magistrate on 11th February 1944 that the policy of the Government was explained to him and that is borne out by the order which the trying Magistrate had made, namely,

"I have not been given the grounds what prompted the District Magistrate or the Superintendent of Police to withdraw from the prosecution of a case against the accused who appear to be all well off. Accordingly, the prayer is rejected. Now the case shall proceed. However, if the Court Sub-Inspector can satisfy the grounds of such withdrawal I am prepared to reconsider."

Section 494, Criminal P. C., says that the withdrawal must be with the consent of the Court. There are numerous decisions on this point but I need only refer to one of this Court, namely, I.L.R. (1939) 1 Cal. 407¹ where at p. 417 it is laid down that the trying Magistrate in deciding whether a case should be withdrawn must exercise a judicial discretion. If the trying Magistrate does not exercise a judicial discretion his action may be reviewed in the superior Courts including this Court and if necessary, his decision rectified. That is the course of justice according to law. If in any case the Government ultimately think that clemency should be shown they have the power in a proper case to show clemency under S. 401, Criminal P. C.

We have perused the records of this case and find nowhere in them is it stated or suggested that the accused persons were starving or driven by necessity to steal. In the petition of complaint the accused were referred to as prominent men of the village. The trying Magistrate refers to them as men who appear to be "all well off." There is a suggestion that at some time before there had been a dispute between the complainant and some of the accused. Moreover, 50 to 60 maunds of paddy were stolen and only a small quantity—less than a maund left for the complainant and his family and dependants. Again, the theft was committed inside the complainant's house by people who are alleged to have been armed with lathis and spears and in the course of the theft had broken the complainant's hand and injured his head. It is one thing for starving men to steal to keep themselves alive; it is another thing altogether for well-to-do men to take almost the whole of a man's food and break his bones as well. The Magistrate had to take all these matters into consideration and it might well appear to him that the interests of justice would not be served by allowing this prosecution to be withdrawn. And it was for him to decide. The trying Magistrate did not act arbitrarily or even finally; he intimated that if further facts were placed before him to justify the withdrawal he was prepared to reconsider his order. That, it seems to me, was a perfectly proper judicial attitude to take up. However, he was not allowed to consider the matter further because on the next day the case was withdrawn from him by the District Magistrate and handed over to the Sub-divisional Officer, Sadar, the purpose of getting a decision at which the trying Magistrate had refused to arrive. The District Magistrate justifies what he has done by the

1. (39) 26 A.I.R. 1939 Cal. 220 : I.L.R. (1939) 1 Cal. 407, Devendra Kumar v. Yar Bakht.

Government circular. If the District Magistrate had read the Government circular carefully, particularly para. 3 (c) and para. 3 (d) he would have realised that the circular did not purport to authorise him to take the action he did. However, it is not a question of whether the District Magistrate correctly interpreted the Government circular; it is a question of whether the District Magistrate was entitled to do what he did. Certainly the District Magistrate has the power to withdraw the case from the trying Magistrate. But as was said by Panckridge J., in 58 C.L.J. 214,² "it is beyond argument that before such an order is made the Magistrate must and should have reasons and those reasons should be such as the law regards as satisfactory from the point of view of principle."

Now, whatever that principle may be, the section should be used in the furtherance of the interests of justice according to law and not in the frustration of it. In the present case the trying Magistrate had nearly finished the hearing of the case and he knew the facts of it better than the District Magistrate or the Superintendent of Police. He considered the application of the Court Sub-Inspector (the Public Prosecutor) in a proper way and was exercising his discretion judicially as the law intended him to. If a District Magistrate withdraws from a trying Magistrate a case, in which the trying Magistrate is exercising his judicial discretion, on the ground that the result is not, or may not be the result that he wishes and sends it to another Magistrate for the express purpose of getting the result he desires, then it is not justice according to law. The justice according to law is for the trying Magistrate to exercise his discretion judicially, if it is wrong the superior Courts to rectify it. If eventually the Government consider that notwithstanding the Court's decision clemency ought to be exercised, the Government may in a proper case exercise it. If District Magistrate can do what has been done in this case, the provisions of the law for securing justice according to law may be set at naught.

In my view the order withdrawing this case from the file of Mr. S. Chatterjee was an improper order and must be set aside. The rule is made absolute and the case returned to Mr. S. Chatterjee for him to consider judicially on all the materials before him whether he can consent to the withdrawal and to give his decision accordingly and further deal with the case according to law. There is one other matter arising out of this case which it is our duty to comment upon. It arises out of that part of the District Magistrate's order which reads,

2. ('34) 21 A.I.R. 1934 Cal. 137 : 58 C. L. J. 214, Shanta Ram v. Kanai Lal.

"it is urgent that the Government order regarding clemency should be carried out. The case is therefore withdrawn to my file and transferred to Sub-Divisional Officer, Sadar, for favour of disposal."

The only inference that can be drawn from that is that the Sub-divisional Officer, Sadar, will make the order which the District Magistrate desires and which he in turn thinks is what the Government desires. It would look as if the District Magistrate contemplated communicating his desire as regards the decision to be given to the Sub-divisional Officer which would be a wrongful interference with the course of justice. In another case which immediately preceded this case, Cri. Misc. Case No. 251 of 1943,³ the District Magistrate transferred a case from one Magistrate to another and gave this as his reason :

"As the principal accused was a prominent public man, well known to the Executive Officers in Pirojpur, I felt that the case should be transferred to Barisal and selected Mr. S. K. Roy to try the case as he is a Munsif (that is to say a member of the Judicial Service and not the Executive) who is temporarily doing magisterial work. I felt that he would be entirely free from any suspicion of Executive influence whether on behalf of the police or on behalf of the accused."

In the present case the District Magistrate has transferred the case from a member of the Judicial Branch to a member of the Executive Branch. It looks very much as if some District Magistrates regard trying Magistrates who are members of the Executive Branch of the Bengal Service as more likely in judicial proceedings to carry out the wishes of District Magistrates and Government than the members of the Judicial branch. This unfortunate impression will only be removed if both District Magistrates and trying Magistrates all make it quite clear that they will not submit to outside interference in judicial proceedings and will have them decided strictly according to law.

Lodge J.—I agree.

R.K.

Rule made absolute.

3. Reported in ('44) 31 A.I.R. 1944 Cal. 407, Hate-mali Jamadar v. Emperor.

A. I. R. (31) 1944 Calcutta 414

DAS J.

Rangalal Mandal and another — Applicants

v.

Narendra Nath Ghose — Respondent.

Application in Suit No. 1833 of 1938, Decided on 1st April 1943.

Bengal Money-lenders Act (10 of 1940), S. 34 (1) (a) (ii)—Preliminary mortgage decree payable by instalments for claim and taxed costs—Costs taxed after date of second instalment — First instalment paid — Notice showing amount of second claim instalment and two instalments of

costs and signed by only one plaintiff — Notice held defective as it showed larger amount than actually due and was not signed by all plaintiffs.

A preliminary mortgage decree provided that the defendant do pay into Court or to the plaintiffs the sum of Rs. 7260 and the taxed costs awarded to the plaintiffs by five equal annual instalments, the first of such instalments to be payable on or before 15th August 1941 (instalment of aforesaid costs being payable upon taxation). In default of payment of any one of the aforesaid instalments or the aforesaid taxed costs the plaintiffs were entitled to apply to the Court after giving notice to the defendant for a final decree for the sale of the mortgaged property subject to the provisions of the Bengal Money-lenders Act. The first instalment of Rs. 1452 was paid but the second instalment of Rs. 1452 which fell due on 15th August 1942 was not paid. Plaintiff's costs were taxed on 18th September 1942 and rupees 1321-10-6 had been allowed. On 6th January 1943 notice under sub-cl. (ii) of cl. (a) of sub-s. (i) of S. 34 was served on the defendant. The notice alleged default in payment of instalment of Rs. 1980-10-6 payable on 15th August 1942 made up of Rs. 1452 (being the second instalment of the sum of Rs. 7260) and Rs. 528-10-6 (being two instalments of the taxed costs of Rs. 1321-10-6). The notice was signed by only one of the plaintiffs :

Held that the notice was defective in two important particulars. The plaintiffs included in the notice a larger sum than what was payable by the defendant at the date of the notice, the first instalment of taxed costs being payable on the date of taxation. The notice also ought to have been signed by all the plaintiffs and not by only one of them. [P 416 C 1,2]

S. K. Basu — for Applicants.

P. C. Basu — for Respondent.

Order. — In this mortgage suit the plaintiffs obtained the usual preliminary and final decrees for sale. Thereafter on 24th April 1941 those decrees were reopened and a fresh preliminary decree was passed for Rs. 7260 and all costs up to that date to be taxed by the taxing officer of the Court. By cl. (4) of this decree it was ordered and decreed that the defendant do pay into Court to the credit of this suit or to the plaintiffs the said sum of Rs. 7260 and the aforesaid taxed costs awarded to the plaintiffs by five equal annual instalments the first of such instalments to be payable on or before 15th August 1941 (instalment of aforesaid costs being payable upon taxation.) By cl. (5) of this decree it was further ordered and decreed (*inter alia*) that in default of payment of any one of the aforesaid instalments or the aforesaid taxed costs plaintiffs may apply to the Court after giving notice to the defendant for a final decree for the sale of the mortgaged property subject to the provisions of the Bengal Money-lenders Act. On 13th August 1941 the defendant paid to the plaintiffs Rs. 1452 being the first instalment payable under the decree. The second instalment of Rs. 1452 fell due on 15th August 1942 but was not paid by the defendant. Plaintiff's costs were taxed on 18th September 1942 and Rs. 1321-10-6 has

been allowed. On 6th January 1943 notice under sub-cl. (ii) of cl. (a) of sub-s. (i) of S. 34, Bengal Money-lenders Act, was served on the defendant. A copy of this notice is annexure "B" to the petition. The plaintiffs have now applied for a final decree. This application is opposed by the defendant-mortgagor on the ground that the notice served as aforesaid did not comply with the requirements of S. 34 (i) (a) (ii). The grounds of objection are formulated in para. 10 of the defendant's affidavit in opposition.

The first objection is that the amount for which default in payment was made on 15th August 1942 has not been correctly shown in the notice. The notice alleges default in payment of instalment of Rs. 1980-10-6 payable on 15th August 1942. This is made up of Rs. 1452 (being the second instalment of the sum of Rs. 7260) and Rs. 528-10-6 (being two instalments of the taxed costs of Rs. 1321-10-6). The plaintiffs contend that under cl. 4 (i) of the decree Rs. 7260 and taxed costs were payable by five equal annual instalments commencing on 15th August 1941, but as the costs had to be taxed it was provided that the instalment of costs was payable upon taxation. In other words each instalment of costs fell due along with each instalment of claim commencing from 15th August 1941 but as regards the instalment of costs its payment was postponed until taxation. Therefore, on 18th September 1942, when the costs were taxed two instalments, i. e., 2/5th of the taxed costs which fell due on 15th August 1941 and 1942 became at once payable and therefore it was quite proper to include in the notice the total sum of Rs. 1980-10-6 computed as stated above. I do not agree that this is the true meaning of the decree on a proper construction of the terms. In my opinion the true meaning of cl. (4) (i) of the decree is that Rs. 7260 and taxed costs were both payable by five equal annual instalments the first instalment of the claim (Rs. 7260) being payable on 15th August 1941 and the first instalment of taxed costs being payable on the date of taxation. This construction appears to me to be more reasonable and appropriate. The debtor cannot pay the costs until the same are ascertained on taxation. The plaintiffs may not get their costs taxed for any length of time. It is unreasonable to hold that the Court intended that the debtor would have to pay several instalments of costs at one and the same time immediately on taxation. This would make the provision for payment by instalment illusory or nugatory. Clause 5 of the decree also makes a distinction between instalment and the taxed costs. The plaintiffs also understood the decree to

mean what I have stated, for, in para. 7 of the petition they describe Rs. 1452 as the first instalment payable under the decree. There is no hardship on the plaintiffs if I adopt the construction I have mentioned, for he can expedite the taxation of the costs. Further if the defendant pays the instalments of claim regularly, then there is no hardship if payment of instalment of costs begin from date of taxation and is paid regularly. If the defendant does not pay any of the instalments of claim or any of the instalments of costs, cl. (5) of the decree at once entitles the plaintiffs to apply for a final decree. In my opinion, the plaintiffs included in the notice a larger sum than what was payable by the defendant at the date of the notice.

The next objection is that the notice is signed by the plaintiff, Ranglal Mondal alone. Under S. 34 (1) (a) (ii) giving of a notice in the form prescribed by rules made under the Bengal Money-lenders Act is condition precedent to the plaintiff's right to apply. If there is one plaintiff and he does not give notice then the application for final decree cannot be made. If there are two plaintiffs and one of them does not give notice, then at least he cannot apply, for he has not fulfilled the condition precedent. It has not been contended that the principle of O. 21, R. 15 can apply to an application for a final decree for sale under S. 34 (1) (a) (ii). Mr. S. K. Basu has argued that the requirements of S. 34 have been substantially complied with. He contends that mentioning a wrong amount or a larger amount does not vitiate the notice. According to him the object of the notice is to put the debtor on his guard that the plaintiffs will now proceed to apply for a final decree so that the debtor may get ready with money to prevent the passing of the final decree. He also argued that it is not necessary for both the plaintiffs to sign the notice. The notice is sufficient because it intimates that an application for final decree is going to be "made by us."

Section 34 (1) (a) (ii) specifically refers to the giving of a notice as may be prescribed. Rule 24 (1) is mandatory that the notice shall be in Form No. 15. The rule does not provide for any variation in the form. The words used in the body are " an application will be made by me" Then there is a space over the word "plaintiff" at the bottom. These two things must be taken together and so taken together certainly indicate that the plaintiffs name will be written there. If there are two plaintiffs then, in my opinion, the names of both of them should be written there. I do not think that the Legislature intended that a stranger can write the name

of the plaintiff. I think that the form indicates that it should be signed by the plaintiff himself and if there are two or more plaintiffs by all of them. If the intention of the Legislature was only that some sort of notice, however informal, should be given, it would not have taken all the pains it has taken in framing a rigid rule and this particular form of notice. This provision for a special notice was deliberate and should be strictly complied with. Having regard to the language of S. 34 and of R. 24 I do not think I can accede to Mr. Basu's argument of substantial compliance in the circumstances of this case when the notice is defective in two important particulars. In my opinion, the notice given to the defendant does not comply with the requirements of the Bengal Money-lenders Act and this application therefore does not lie. The other grounds do not appear to me to be of any substance. I dismiss the application with costs.

R.K.

*Application dismissed.***A. I. R. (31) 1944 Calcutta 416**

HENDERSON J.

*Sm. Nivanani Debi w/o Jaharlal Bhattacharjee and another—Decree-holders
— Appellants*

v.

*Chhakuram Doloi—Judgment-debtor —
Respondent.*

Appeal No. 241 of 1942, Decided on 28th February 1944, from appellate order of Dist. Judge, Howrah, D/- 7th May 1942.

(a) Bengal Tenancy Act (8 of 1885), S. 193 — "Suit" includes execution proceedings.

The term "suit" in S. 193 is sufficiently wide to include execution proceedings. [P 417 C 1]

(b) Bengal Tenancy Act (8 of 1885), S. 168A— Onus is on judgment-debtor to show that he is entitled to protection of S. 168A.

It is for the judgment-debtor to show that he is entitled to the protection of S. 168A and if he fails to adduce evidence necessary to bring his case within its terms, his objection will be overruled. [P 417 C 1]

(c) Bengal Tenancy Act (8 of 1885), S. 168A— Decree for arrears of rent due in respect of jalkar pure or including sub-soil — S. 168A does not apply.

Section 168A refers to a decree for arrears of rent due in respect of a tenure or holding. In view of the definitions of these terms in S. 3 of the Act, S. 168A cannot apply to a decree for arrears of rent due in respect of a jalkar pure or including the sub-soil : 5 I. C. 158 (Cal.), *Approved*. [P 417 C 1]

Chandra Sekhar Sen and Sudhir Kumar Acharja — for Appellants.

Judgment.—This appeal is by the decree-holders. The question involved is the application of S. 168A, Bengal Tenancy Act. It is unfortunate that the respondent is not re-

presented but Mr. Sen has put the case fairly before me. The suit was for rent due on a jalkar. The present execution application is for the sale of certain Nishkar properties. The judgment-debtor filed an application under S. 47, Civil P. C., to the effect that such execution is barred under S. 168A, Ben. Ten. Act. Two arguments have been put forward in support of the appeal—(1) that S. 193, Ben. Ten. Act, does not include the execution proceedings and (2) that S. 168A, Ben. Ten. Act, is excluded by its terms. In my opinion, the term "suit" in S. 193 is sufficiently wide to include execution proceedings. In dealing with the second point the learned District Judge held that the section would not apply if the lease was not a pure jalkar but included the sub-soil. As, however, there is no evidence on the point, he allowed the objection. Here the learned District Judge appears to have put the burden of proof on the wrong side. It is for the judgment-debtor to show that he is entitled to the protection of the section, and if he fails to adduce the evidence necessary to bring his case within its terms, his objection will be overruled. Mr. Sen however was content to argue that the objection fails in either case. If the lease includes the sub-soil the view taken by the learned District Judge is supported by the decision in 5 I. C. 158.¹ On the second alternative it is necessary to note the terms of S. 168A: The reference is to a decree for arrears of rent due in respect of a tenure or holding. In view of the definition of these terms in S. 3 of the Act, it seems to me to be impossible to say that S. 168A applies to a decree for arrears of rent due in respect of a jalkar. The appeal is allowed, the orders of the Courts below are set aside and the respondent's objection under S. 47, Civil P. C., dismissed with costs in all Courts—hearing fee in this Court one gold mohur.

G.N.

Appeal allowed.

1. (10) 5 I. C. 158 (Cal.), Gour Mohan v. Chandi Charan.

A. I. R. (31) 1944 Calcutta 417

EDGLEY AND ROXBURGH JJ.

*Bireswar Banerji — Accused
Petitioner*

v.

Emperor.

Criminal Revn. Nos. 921 and 995 of 1943, Decided on 12th May 1944.

(a) Calcutta Tramways Act (1 of 1880), By-laws under, framed by the Calcutta Tramways Company, by-law (7)—Tender of fare by passenger—Tender to be valid must be of exact amount—Conductor of Tramways is under no obligation to provide change.

1944 C/53 & 54

In order to make a valid tender of a sum the exact amount must be tendered, or if a larger amount is tendered, the tenderer must be prepared to forgo any demand for the change. There is no obligation on the part of the receiver to provide the change in order that the tender may be for only the exact amount due. Consequently a tramway rider in order to make a valid payment of the amount of the fare legally demandable for the journey must pay the exact amount due : (1811) 3 Camp. 70 and ('44) 31 A.I.R. 1944 Nag. 135, *Rel. on.* [P 418 C 1]

(b) Calcutta Tramways Act (1 of 1880), S. 21 — Whether act or omission amounts to avoidance of payment of fare is question of fact — Accused travelling in tramway offering one rupee to conductor for fare and demanding change in order to establish right of passengers to obtain change—Accused held not guilty under section 21.

The question whether particular acts or omissions amount to avoidance of payment of the fare within the meaning of S. 21 is a question of fact to be determined on the circumstances of each case.

[P 418 C 2]

The accused who was travelling in the tramway concluded that the Tramway Company were acting improperly in demanding that the exact fare should be tendered by the passengers and in refusing to give change and considering himself as a protagonist of the tramway riders sought to establish their right to obtain change by offering a rupee to the conductor for his fare (which amounted to less than a rupee) and demanding that change should be given before he would hand over the rupee :

Held that though the accused had taken a wrong view of the law on the matter he could not be said to have avoided payment of the fare within the meaning of S. 21.

[P 418 C 2]

(c) Criminal P. C. (1898), S. 204 — Process fee for summons not filed — No summons issued—Proper procedure is to dismiss complaint and not to acquit accused.

Where the process fee for the summons has not been filed by the complainant and no summons is issued to the accused the proper procedure for the Court is to dismiss the complaint under S. 204. An order acquitting the accused in such circumstances is not strictly correct.

[P 418 C 2]

Nikhil Chandra Talukdar, Gurudas Bhattacharjee, Nitya Ranjan Biswas, Mono Mohan Mukherjee, Sailendra Nath Choudhury, Arun Kumar Dutt and Rama Prosanna Bagchi —

for Petitioner.

Anil Chandra Roy Choudhury and Gopal Chandra Shome — for the Crown.

Roxburgh J.—Rule 921 has been obtained by the petitioner against an order of conviction under S. 21, Calcutta Tramways Act (Bengal Act 1 of 1880) in a case in which the learned Presidency Magistrate inflicted no substantive sentence, but, as he expressed it, warned and discharged the accused. Rule 995 has been obtained by the same petitioner against an order of the Chief Presidency Magistrate acquitting a conductor and an inspector of the Calcutta Tramways Company against whom he had directed processes to issue on a complaint made by the petitioner. The two cases arise out of the same matter.

It appears that the petitioner who is a young lawyer had concluded that the Tramways Company were acting improperly in demanding that the exact fare should be tendered by the passengers and in refusing to give change. He offered a rupee for his fare from Esplanade to Alipore and demanded that change should be given before he would hand over the rupee. There can be no doubt that he took a wrong view of the law in the matter. He appears to have been misled by discovering that under the Indian Coinage Act (Act 3 of 1906) a rupee is legal tender. Perhaps, he does not appear to have observed that under S. 26, Reserve Bank of India Act (Act 2 of 1934) Bank notes which may be of denominational values from rupees five to rupees ten thousand are also legal tender. If his view were a correct one, he might equally board a tram and offer a ten thousand rupee note to the conductor and demand change.

Under by-law (7) framed by the Calcutta Tramways Company under the Act, it is provided that every passenger shall upon demand pay to the conductor the fare legally demandable for the journey. It is well settled that in order to make a valid tender of a sum, the exact amount must be tendered, or if a larger amount is tendered, the tenderer must be prepared to forgo any demand for the change. There is no obligation on the part of the receiver to provide the change in order that the tender may be for only the exact amount due. Reference may be made to (1811) 3 Camp. 70,¹ and other cases referred to in para. 277 of Halsbury's Laws of England, Edn. 2: *vide also* A. I. R. 1944 Nag. 135.² As a result of the dispute on the tram about the liability to give change evidently some heat was engendered and eventually both parties found themselves at Hastings thana, and the petitioner was challaned for "non-payment" of the tram fare under S. 21, Calcutta Tramways Act. He in turn filed a complaint before the Chief Presidency Magistrate against the conductor and the inspector of the Tramways and also against the agent and the director of the Tramways Company. The Chief Presidency Magistrate directed summons to issue against the conductor and the inspector only. On the date fixed for their appearance, 6th August 1943, the petitioner was being tried in another Court in the same building in the petty case under S. 21, Calcutta Tramways Act. For some reason or other, he had failed to deposit the process fees for the issue of the summons, and finding this to be the case and in the absence of the petitioner or his lawyer,

the learned Chief Presidency Magistrate passed an order acquitting the two men against whom summonses had not been issued.

As regards the case against the petitioner under S. 21, Calcutta Tramways Act, though he was in error in thinking that his offer of a rupee provided the change was given was a proper payment of the legal fare, we think that in the circumstances of the case it cannot be said that he wished to avoid payment within the meaning of S. 21 of the Act. The question whether particular acts or omissions amount to avoidance of payment of the fare within the meaning of this section is a question of fact to be determined on the circumstances of each case. In the present case, it appears that the petitioner considered himself as a protagonist of the Calcutta Tramway riders and sought to establish their right to obtain change. Though he was mistaken in doing so, we think that the correct order should have been to acquit him on that particular charge. As regards his own case against the tramways employees, it is sufficient to remark that the order of the learned Chief Presidency Magistrate appears to be incorrect. The proper procedure in the circumstances of the case before him was for him to have dismissed the complaint under S. 204 (3), Criminal P. C. He had merely directed that summons should issue, process fees for the summons had not been filed, and no summons had issued. Section 204 (3) provides for the proper procedure in these circumstances. The order of the acquittal is not strictly correct. Learned advocate for the petitioner, however, has stated that in view of the order proposed to be passed in Rule 921 he did not press his application in Rule 995. The result is that Rule 921 is made absolute, the order of conviction is set aside and the accused is acquitted on the charge under S. 21, Calcutta Tramways Act. Rule 995 is discharged.

Edgley J. — I agree.

G.N.

Order accordingly.

A. I. R. (31) 1944 Calcutta 418

SPECIAL BENCH

NASIM ALI, MITTER AND SHARPE JJ.

*Sudhir Krishna Ghose and another —
Decree-holders — Appellants*

v.

*Satish Chandra Hui, Judgment-debtor &
and others — Respondents.*

Appeal No. 166 of 1942, Decided on 29th August 1944, from original order of Sub-Judge, First Court, Midnapore, D/- 16th July 1942.

1. (1811) 3 Camp. 70, *Betterbee v. Davis*.

2. (44) 31 A.I.R. 1944 Nag. 135, *Madhao Vithal v. Emperor*.

Bengal Tenancy Act (8 of 1885, as amended in 1940), S. 168A—Rent decree—Receiver of judgment-debtor's property can be appointed.

Section 168A of the Act does not bar the execution of a rent decree by the appointment of a receiver of the judgment-debtor's property under S. 51 (d), Civil P. C. : ('43) 30 A. I. R. 1943 Cal. 233; ('44) 31 A. I. R. 1944 Cal. 240 and (1887) 18 Q. B. D. 127, *Rel. on.* [P 420 C 2]

Panchanon Ghose and Shyama Ch. Mitter —
for Appellants.

Atul Ch. Gupta and Surendra Nath Das —
for Respondents.

Nasim Ali J.—On 14th May 1940 the appellants obtained a decree against the respondents in rent suit No. 2 of 1939 in the Court of the Subordinate Judge at Midnapore for arrears of rent of a patni tenure. Before this decree the interest of the decree-holder appellants was sold away at a revenue sale and the judgment-debtors interest in the patni was transferred to some other persons with the result that the decree passed in the rent suit had the effect of a money decree. On 21st June 1940, the appellants put this decree into execution in Execution Case No. 14 of 1940. In the application for execution, the appellants prayed for realisation of the decretal amount by attachment and sale of certain properties belonging to judgment-debtors 6 to 9 and 25 to 28. These were properties other than the tenure in arrears. The properties were attached on 21st December 1940. On 9th January 1941 the Bengal Tenancy Amendment Act of 1940 by which S. 168A was introduced into the Act came into force. On 16th January 1941 the judgment-debtors Nos. 6 to 9 filed a petition objecting to the sale of the properties attached in view of the provisions of S. 168A, Ben. Ten. Act. On 25th January 1941 the Subordinate Judge overruled these objections. On 3rd February 1941 the judgment-debtors 6 to 9 filed an appeal F. M. A. No. 52 of 1941¹ in this Court against the order of the Subordinate Judge dated 25th January 1941. This appeal was allowed by this Court on 27th February 1942. The decree-holder has obtained leave of this Court to appeal to His Majesty in Council against the order of this Court allowing the appeal. On 29th April 1942 the decree-holder filed another application of execution of the decree in rent suit No. 2 of 1939 against judgment-debtors 6 to 9 and 25 to 28. This execution case was registered as Execution Case No. 4 of 1942. In this execution case the decree-holder prayed for the realisation of the decretal amount by the appointment of a receiver under S. 51, Civil P. C., of certain properties of judgment-debtors 6 to 9 and 25 to

28. These properties do not include the tenure in arrears. On 30th May 1942 the judgment-debtors 6 to 9 and 25 to 28 filed objections to this execution petition. The objection of the judgment-debtor so far as it is relevant for purposes of the present appeal is that in view of the provisions of S. 168A, Ben. Ten. Act, the executing Court has no power under S. 51, Civil P. C., to appoint a receiver of the properties. This objection of the judgment-debtors has been allowed. Hence this appeal by the decree-holders. Section 51, Civil P. C., runs as follows :

"Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree : (a) by delivery of any property specifically decreed; (b) by attachment and sale or by sale without attachment of any property ; (c) by arrest and detention in prison ; (d) by appointing a receiver ; or (e) in such other manner as the nature of the relief granted may require."

The material provisions of S. 168A, Ben. Ten. Act, are :

"1 (a) a decree for arrears of rent due in respect of a tenure or holding, whether having the effect of a rent decree or money decree, or a certificate for such arrears signed under the Bengal Public Demands Recovery Act, 1913, shall not be executed by the attachment and sale of any moveable or immoveable property other than the entire tenure or holding to which the decree or certificate relates :

Provided that the provisions of this clause shall not apply if, in any manner other than by surrender of the tenure or holding the term of the tenancy expires before an application is made for the execution of such a decree or certificate ;

(b) the purchaser at a sale referred to in cl. (a) shall be liable to pay to the decree-holder or certificate-holder the deficiency, if any between the purchase price and the amount due under the decree or certificate together with the costs incurred in bringing the tenure or holding to sale and any rent which may have become payable to the decree-holder between the date of the institution of the suit and the date of the confirmation of the sale."

In 47 C. W. N. 287,² Henderson J. has held that S. 168A, Ben. Ten. Act, does not prohibit or affect any mode of execution other than the attachment and sale of the judgment-debtor's property and does not therefore bar his arrest and detention. In 48 C. W. N. 344³ a Division Bench of this Court has held that S. 168A, Ben. Ten. Act, does not bar the execution of a rent decree by attachment under the provisions of O. 21, R. 53, Civil P. C., of a decree passed in favour of the judgment-debtor. The reasons given in support of this decision are these :

"(a) Section 168A is an encroachment upon the rights which the landlord decree-holder had under

2. ('43) 30 A. I. R. 1943 Cal. 233 : I. L. R. (1943) 1 Cal. 538 : 47 C. W. N. 287, Bahadur Singh Singhi v. Sanyasi Charan Ghose.

3. ('44) 31 A. I. R. 1944 Cal. 240 : 48 C. W. N. 344, Anil Kumar v. Beman Behari.

1. Reported in ('42) 29 A. I. R. 1942 Cal. 429, Satish Chandra v. Sudhir Krishna.

the ordinary law and it cannot be extended beyond what is warranted by the actual language of the section.

(b) In construing an Act the Court of law had got to ascertain the intentions of the legislature from what the latter has chosen to enact either in express words or by reasonable implications.

(c) A judicial tribunal is bound to give effect to the clear language used in a statute even though it is of opinion that consequences are not such as could have been contemplated by the Legislature.

(d) There are no words in S. 168A which show that the only form of execution which is available to the decree-holder is to attach and sale the defaulting tenure and nothing else.

(e) A mere attachment without sale of the property is not prohibited by S. 168A.

The contention of Mr. Gupta appearing on behalf of the respondents is that although there are no express words in S. 168A which prohibit any mode of execution other than the attachment and sale of the judgment-debtor's property the reasonable implication of S. 168A (1) (b) is that the tenant judgment-debtor is not liable beyond the defaulting tenure. Section 168A (1) (b) assumes that the defaulting tenure is available to the decree-holder for the satisfaction of his decree and that the defaulting tenure has been sold and purchased in execution of the decree. Where the defaulting tenure is liable to be sold in execution of the decree and is actually sold the tenant has no further liability as the decree becomes satisfied and the question of further execution of the decree does not arise. Where, as in the present case, the defaulting tenure is not available to the decree-holder and cannot be sold in execution of the decree, S. 168A (1) (b) does not come into operation, the personal liability of the judgment-debtor under the decree continues and there is no reason why the decretal amount cannot be realised by modes of execution other than the attachment and sale of the judgment-debtor's properties. The next contention of Mr. Gupta is this: the proviso to S. 60, Civil P. C., mentions the properties which are not liable to attachment or sale and S. 168A (1) (a) also lays down the properties which are not liable to attachment or sale. Therefore the word "and" coming between attachment and sale in S. 168A (1) (a) should be construed as "or" as in the proviso to S. 60, Civil P. C. A receiver cannot be appointed of properties which are exempted from attachment or sale under the proviso to S. 60 of the Code. No receiver can therefore be appointed of properties of the judgment-debtor which cannot be attached or sold under S. 168A (1) (a). In 48 C. W. N. 344³ Mukherji J., said:

"The words (attachment and sale) have been taken verbatim from S. 51, cl. (b), Civil P. C., and it seems to us that the latter part of the clause was not reproduced in S. 168A, Ben. Ten. Act, probably because

no question of sale of any property without attachment can possibly arise when a rent decree is being executed. We do not think that a mere attachment without sale of the property does at all come within the purview of S. 168A, Ben. Ten. Act."

Mr. Gupta in support of his contention that a receiver cannot be appointed of properties which are exempted from attachment or sale under S. 60, Civil P. C., relied on (1887) 18 Q.B.D. 127.⁴ In that case the Court of appeal held that an order appointing a receiver of the pension of an officer of Her Majesty's Forces was bad as by S. 141, Army Act, 1881, such pension was made inalienable by the voluntary act of the person entitled to it. "Right to future maintenance" cannot be attached or sold in view of the provisions of S. 60 sub-s. 1 (n), Civil P. C. In 52 I. A. 262,⁵ their Lordships of the Judicial Committee said:

"The right of maintenance is in point of law not attachable and not saleable. They think that S. 60, Civil P. C., sub-s. (n), precludes an application for that purpose."

"The proper remedy lies in a fit case in the appointment of a receiver for realising the rent and profits of the property paying out of the same sufficient and adequate sum for the maintenance of the judgment-debtor and his family and applying the balance, if any, to the liquidation of the judgment-debtor's debt."

We are therefore of opinion that a receiver can be appointed of properties of the tenant judgment-debtor which are not liable to be attached or sold in execution of the rent decree. The last contention of Mr. Gupta was this: Section 168A prohibits the sale of the moveable property of the tenant judgment-debtor. The decree-holder in the present case asks for the appointment of a receiver of some khamar lands of the judgment-debtor. These khamar lands yield paddy. The receiver will have to sell this paddy which is the moveable property of the judgment-debtor. By getting a receiver appointed the decree-holder will therefore be entitled to do indirectly what he cannot do directly. Section 168A (1) (a) prohibits the attachment and sale of moveable property of the judgment-debtor in execution of a decree. It does not prohibit private sale of any moveable property which does not require previous attachment. For the reasons given above we are of opinion that S. 168A, Ben. Ten. Act, does not bar the execution of a rent decree by the appointment of a receiver of the judgment-debtor's property under S. 51 (d), Civil P. C. The result therefore is that this appeal is allowed. The order of the Subordinate Judge is set aside. The Subordinate Judge is directed to proceed with the execution of the decree by the appointment of a receiver of the properties

4. (1887) 18 Q. B. D. 127, *Lucas v. Harris*.

5. (25) 12 A.I.R. 1925 P. C. 176 : 47 All. 385 : 52 I. A. 262 (P.C.), *Rajendra Narayan v. Sundari Bibi*.

which are mentioned in the petition for execution. There would be no order as to costs.

Mitter J.—I agree.

Sharpe J.—I agree.

R.K.

Appeal allowed.

A. I. R. (31) 1944 Calcutta 421

MITTER AND SHARPE JJ.

Insane Nil Govinda Misra, Defendant 5, represented by guardian wife Khanta Mayi Deby and after his death his sole heiress and legal representative Khanta Mayi Deby and others — Defendants — Appellants

v.

Sm. Rukmini Deby w/o Radha Gobinda Misra, Plaintiff and others, Defendants — Respondents.

Appeals Nos. 140 and 152 of 1940, Decided on 16th June 1944, from original decrees of Sub-Judge, Bankura, D/- 30th April 1940.

(a) Hindu Women's Rights to Property Act (1937) — "Agricultural land" in Government of India Act, 1935, Sch. 7, List 2, Item 21, explained.

The phrase "agricultural land" in List 2, includes any interest in agricultural land whether that interest be that of the superior proprietor, namely, the zamindar, or of the tenure-holder, under-tenure-holder or of the raiyat or under-raiyat. If the physical object be agricultural land, it is the Provincial Legislature and the Provincial Legislature only which can make laws dealing with succession to the rights in which such land is held. A tenure-holder, be he a niskar or a mukarari mourashidar or a patnidar or a non-permanent tenure-holder, is not an ijardar or mere farmer of rent. He has a proprietary interest in the land which is comprised in his tenure. If his tenure comprises agricultural land and if he is a Hindu his rights therein would devolve on his death not in the manner provided for in the Hindu Women's Rights to Property Act of 1937 or 1938, but by the rules of Hindu law of that school by which he was governed at his death till the time the Provincial Legislature modified the Hindu law of succession. If the tenure be of a composite nature consisting of agricultural land as also non-agricultural land, the right in the agricultural portion would at the present time devolve in accordance with the Hindu law and in the non-agricultural portion according to the provisions of the aforesaid Act. The Central Legislature has no power to make laws regarding succession to rights in or over agricultural land, and as a legislative body must be presumed to have legislated intra vires the word "property" used in Act 18 of 1937 must mean property in non-agricultural land. The physical character of the land included in the tenure must determine the rule of succession—whether succession would be in accordance with that Act or according to the rules of Hindu law, as long as the Provincial Legislature does not pass a law regulating devolution of "agricultural land" held by Hindus. Lands used or lands though lying unused, but capable of being used, having regard to its general nature and character, for raising through the labour of man, food for men and beasts, food grains and vegetables and fodder, and other marketable commodities like cotton, jute hemp, flax, etc., lands used as orchards, or for farming purposes, i.e., for raising or feeding of cattle and other live stocks as also lands used as accessory to the above

purposes, e.g., irrigating tanks and sites used for the farmer's residence should be regarded as agricultural lands. Dwelling houses other than those used for residence of cultivators or farmers should be regarded as non-agricultural property. Within the term 'dwelling house' must be included not only the structure used for residence and its site, but also adjacent buildings or outhouses, curtilage, garden, courtyard, orchard which is within what can be regarded as the compound of the house, and all that is necessary for the convenient use of the house. Lands which are being actually worked for minerals would be regarded as mines and so non-agricultural property, as also lands covered by forest, on the ground that forest produce is not raised by human labour. Possibly land used for planting trees for being used for fuel would be regarded as non-agricultural land.

[P 424 C 1, 2; P 425 C 1]

(b) Partition — Suit for — Defendant claiming share by metes and bounds in property in which plaintiff does not claim share but other defendants do — Such defendants' claim should be granted—Separate suit is not necessary.

A cosharer, be he or she a plaintiff or defendant in a suit for partition, is entitled to claim a separate allotment at any stage before the final decree. There can be partition by metes and bounds even of those properties in which the plaintiff has no share but one of the other defendants claims separate allotment. A separate suit need not be brought.

[P 425 C 2; P 426 C 1]

H. D. Bose, B. K. Choudhury, Sailendra Nath Banerjee and Bijoy Kumar Bhose — for Appellants (in 140) and for Respondents (in 152).

Rama Prosad Mukherjee and Jagannath Gangopadhaya — for Appellants (in 152) and for Respondents (in 140).

Dr. R. B. Pal and Purusattam Chatterjee — for Respondents (in 140 and 152).

Judgment. — Bama Charan Misra, the common ancestor of the parties to this litigation died leaving five sons, Ram Gobinda, Radha Gobinda, Broja Govinda, Nil Govinda and Dole Gobinda. The family is admittedly governed by the Mitakshara school of Hindu law. Those five sons lived as members of a joint family. Dole Gobinda had no male issue. He died in September 1923 leaving a widow. Dole Gobinda's interest in the joint ancestral properties accordingly passed by survivorship to his four brothers. At the date of the institution of the suit of the sons of Bama Charan only Nil Gobinda was alive. He was, however, then a lunatic, having become insane at a comparatively early age. He died after the decree of the lower Court leaving a daughter and daughter's sons and his sonless widow, Khanta Mayi. Khanta Mayi has been substituted in his place. She is one of the respondents in First Appeal No. 140 and the sole appellant in First Appeal No. 152.

Radha Gobinda died without leaving direct male descendants on 5th June 1937 after the Hindu Women's Rights to Property Act (18 of 1937) had come into operation. The plaintiff, Srimati Rukmini Debi, is his widow. On 25th February 1939 she instituted this suit for partition. The defendants to the suit were

Nil Gobinda, the surviving son of Bama Charan and the male descendants in the direct line—sons and grandsons of the other three sons of Bama Charan. The plaint proceeded upon the basis that the plaintiff's husband was at the time of his death a member of a joint Mitakshara family of which the defendants were the other coparceners. In the plaint she stated that the properties described in Schedules Ka and Kha attached to the plaint were the joint ancestral properties of the sons of Bama Charan and those described in Schedule Ga were their joint self-acquired properties. She claimed one-fourth share in all of them on the basis of s. 3 (2), Hindu Women's Rights to Property Act of 1937 (hereinafter called the Act) and prayed for partition by metes and bounds. The learned Subordinate Judge considered the questions raised by the defendants. He overruled them and declared the plaintiff's share in all the properties to be one-fourth. He passed a preliminary decree for partition on 30th April 1940. He directed the Commissioner of partition to make two allotments one to be allotted to the plaintiff for her one-fourth share and the other to be allotted to all the defendants jointly as representing their three-fourth share. Before him the guardian ad litem of defendant 5 (Nil Gobinda) prayed for a separate allotment but the learned Subordinate Judge refused that prayer. Defendants 1 and 2 (the sons of Ram Gobinda), defendants 3 and 4 (the sons of Broja Gobinda) and defendant 6, a son of defendant 3 have preferred First Appeal No. 140. First Appeal No. 152 was filed on behalf of defendant 5.

None of the parties before us question the findings of the learned Subordinate Judge that the family continued to be joint at the date of the institution of the suit and that Nil Gobinda had a share in all the properties in suit. At the time when the learned Subordinate Judge pronounced his judgment the precise scope of the Hindu Women's Rights to Property Act of 1937 had not been determined. Since then the Federal Court has held in 45 C. W. N. F. R. 81¹ that that Act has no operation on "agricultural land" with the result that devolution of such lands would not be governed by the provisions of that Act but by the provisions of Hindu law.

After that decision of the Federal Court these appeals were heard by a Division Bench consisting of the learned Chief Justice and Nasim Ali J. That Bench made an order on 28th May 1942, under O. 41, R. 25, Civil P. C.,

by which the learned Subordinate Judge was directed to take evidence as to each of the items of property mentioned in the schedules attached to the plaint in the following respects : (i) the nature of the land and (ii) the use to which it was put at the time of the death of Radha Gobinda, and to transmit that evidence together with his conclusion as to which of them were agricultural lands. In accordance with this order the learned Subordinate Judge took evidence. He has forwarded to this Court the evidence recorded by him together with his conclusions thereon which are embodied in his judgment dated 8th August 1942. His general conclusions are as follows : (i) That the rights of tenure holders or niskardars in agricultural lands cannot be regarded as non-agricultural property ; (ii) that the phrase "agricultural land" means land actually used for the purpose of agriculture or for purposes subservient to agriculture ; (iii) that land used for the purpose of raising food crops for the use of men and beasts and for horticultural purposes would be regarded as agricultural land, but a garden used for the purpose of gathering fruits would not be so regarded.

Applying those general conclusions he came to the following findings in respect of the lands held in khas possession by the family, namely, (i) that those lands which were cultivated for raising food crops at the time of Radha Gobinda's death were agricultural property notwithstanding the fact that the parties held them in tenure or niskar right and notwithstanding the fact that some of those lands contained minerals underneath, such as lime stone, etc.; (ii) that lands falling under the category of danga (high arable land), patit (waste lands but which can be brought under cultivation) and garlayek patit (waste lands which cannot be brought under cultivation) would have to be considered as agricultural property the last mentioned class on the ground that they were and are used as pasture grounds for cattle which include cattle used in agricultural operations ; (iii) that the tanks must be considered as agricultural lands as the waters thereof were and are used for irrigating the agricultural fields, though fish is reared in them, and their banks must also be considered as agricultural property as parts were and are used for raising crops and parts for grazing cattle which include cattle used in agricultural operations ; (iv) that the waste lands on which palash trees had grown are to be regarded as agricultural property, as those trees were and are used for "lac cultivation." (v) that the garden lands in village Mochra Kend are to be regarded as non-agricultural property as they contained only fruit bearing trees and were not used for horticultural

1. ('41) 28 A. I. R. 1941 F. C. 72 : I. L. R. (1941) Kar. F. C. 148 : 1941 F. C. R. 12 : 45 C. W. N. F. R. 81 (F. C.), In the matter of Hindu Women's Rights to Property Act, 1937.

purposes e. g., for raising vegetables; (vi) that deb-sthans (sites occupied by temples) are to be regarded as non-agricultural property; (vii) that the residential house of the parties and its compound with the paddy morais (store house for paddy) and the cow-sheds and their sites which are within the said compound are non-agricultural property and (viii) that the paddy khamars outside the said compound and the vegetable garden of the parties are to be regarded as agricultural property.

In regard to lands included in the tenancies of under-tenants he observed that the pathways, nullas (water passages) khals and the homestead of tenants would be regarded as non-agricultural property, with the result that the plaintiff would be entitled to receive a portion of the rent from those tenants whose tenancies included both hasil, danga, patit and garlayek patit lands as also items of the above mentioned description, namely homestead, pathways, khals and nullahs. We have to consider whether the aforesaid conclusions—both general and special—of the learned Subordinate Judge are correct. In view of O. 37-A, Civil P. C., notice was given both to the Advocate-General of India and of Bengal but none of them has taken part at the hearing. Dr. Pal, who has appeared for the plaintiff, has urged two points before us. He says (1) that the first mentioned general conclusion of the learned Subordinate Judge is wrong, and (2) that at any rate the plaintiff is entitled under the Hindu law to one fourth share in the properties described in schedule Ga of the plaint. As the second contention requires the consideration of the few facts we will deal with it first.

In para. 1 of the plaint the plaintiff stated that the properties of schedule Ga were the self-acquired properties of her husband and of the predecessors of the defendants. If in fact that was so, the plaintiff would inherit her husband's share under the Hindu law, which on the facts would be not one fourth but one fifth. That statement was not denied in the written statements of defendants 1 to 4 and 6 but defendants 7 to 14 denied the same. No issue, however, was framed in the lower Court and the judgment of the lower Court does not contain a decision on the point. In her deposition, however, the plaintiff admitted that her husband and his brothers had no personal properties and all their properties were either their ancestral properties or acquired by them from out of the income of their ancestral properties. In view of this admission the properties described in schedule Ga must stand on the same footing as those described in schedules Ka and Kha so far as the plaintiff's

claim to them is concerned. Lands representing 9 annas share of village Mochrakend were held by the plaintiff's husband and his coparceners in niskar right, that is to say, as rent free tenure-holders. Those are described in detail in schedule Ka of the plaint. Lands representing the remaining share of the said village, which are described in schedule Kha of the plaint, belonged to them in patni taluki right. Some of the lands described in schedule Ga were held by them in tenure (middlemen's) right and some in raiyati right. The properties described in schedules Ka and Kha are the joint ancestral properties of the plaintiff's husband and his coparceners and those described in schedule Ga are accretions thereto, having been acquired out of the income of the joint ancestral properties. The lands of those three schedules fall within the following classes: Class 1—Lands held in khas possession of the family. Class 2—Lands let out to under-tenants.

Of lands of class 1 a good area was and is cultivated with food crops, a portion is occupied by tanks and their banks, a portion by vegetable gardens, orchards and a portion by the residential house of the family with its compound and appendages. The rest is waste land, either layek patit (wastes which could be brought under cultivation) or gar layek patit (wastes which cannot be brought under cultivation). Nearly all the tanks were and are used for irrigating the arable fields and probably some were and are used exclusively for rearing fish and for domestic purposes. Some of the gar layek wastes contain polash trees which produce lac. The lands on which they have grown were and are mostly used as pasture ground. Some of the cultivated lands have minerals underneath, mostly lime stones, but they are not used for working minerals but the surface is used for cultivation. The greater area of lands falling under the second class, e.g., tenanted lands, are arable fields. Portions are occupied by homesteads on which the cultivating tenants have their huts to live in. Portions are pathways khals and nullas or drainage channels. As all the immovable properties were the joint ancestral properties of the plaintiff's husband and his coparceners, or accretions thereto, they would pass under the Hindu law to the plaintiff's husband's surviving brother and to his brother's sons by survivorship. The plaintiff can claim a share therein only by the force of S. 3, sub-s. (2), Hindu Women's Rights to Property Act (18 of 1937). As the word "property" used in that sub-section means "property other than agricultural land" (1941 F.C.R. 12)¹ the plaintiffs cannot get a share in such of the properties described in the plaint

as can be regarded as "agricultural land." The question therefore in the appeal is what meaning should be attributed to the phrase "devolution to agricultural land" used in item 21 of List 2 of Sch. 7, Constitution Act.

The Provincial Legislature has the exclusive power to pass laws relating to "devolution of agricultural land and on subjects mentioned in that item. But *"jus descendit et non terra"* the right descends and not the land (Coke on Littleton, S. 345). That subject therefore means that the Provincial Legislature has the exclusive power to pass laws dealing with succession to rights in agricultural land. Moreover, Parliament knew that in India a great deal of sub-infeudation exists in respect of agricultural land and by giving the Provincial Legislature the exclusive power to legislate in respect to devolution of agricultural land it could not have intended to confer the power to legislate only in respect of the lowest grade of interest in agricultural land — that of the raiyat or under-raiyat only. We hold that the phrase "agricultural land" includes any interest in agricultural land whether that interest be that of the superior proprietor, namely the zamindar, or of the tenure-holder, under-tenure-holder or of the raiyat or under-raiyat. If the physical object be agricultural land it is the Provincial Legislature and the Provincial Legislature only which can make laws dealing with succession to the rights in which such land is held. A tenure-holder, be he a niskar or a mukarari mourashidar or a patnidar or a non-permanent tenure-holder, is not an iyardar or mere farmer of rent. He has a proprietary interest in the land which is comprised in his tenure. If his tenure comprises agricultural land and if he is a Hindu his rights therein would devolve on his death not in the manner provided for in the Hindu Women's Rights to Property Act of 1937 or 1938 but by the rules of Hindu law of that School by which he was governed at his death till the time the Bengal Provincial Legislature modified the Hindu Law of Succession. If the tenure be of a composite nature consisting of agricultural land as also non-agricultural land, the right in the agricultural portion would at the present time devolve in accordance with the Hindu law and in the non-agricultural portion according to the provisions of the aforesaid Act. The observations of the Federal Court in 4 F. C. R. 53² at p. 61 lend support to the view we are taking. There the Federal Court held the phrase "agricultural land" to

mean "rights in or over agricultural land," and the right of a tenure-holder, whose tenure comprises agricultural land, can certainly be described as right in or over agricultural land. The Central Legislature has therefore no power to make laws regarding succession to rights in or over agricultural land, and as a legislative body must be presumed to have legislated *intra vires*, we must hold that the word "property" used in Act 18 of 1937 means property in non-agricultural land. We cannot, therefore, accept the contention of the plaintiff's advocate that as a tenure-holder is middle man whose right is primarily to collect rent from the occupying tenants, his right is to be considered as property within the meaning of S. 8 (2) and so would devolve on his death according to the provisions of Act 18 of 1937,—though his tenure comprised agricultural lands only. The physical character of the land included in the tenure must, in our judgment, determine the rule of succession — whether succession would be in accordance with that Act or according to the rules of Hindu law, as long as the Provincial Legislature does not pass the law regulating devolution of "agricultural land" held by Hindus. We must accordingly consider what should be the physical character of the land so that it may be classed as agricultural land within the meaning of item 21 of List II. This question was raised in 4 F. C. R. 53² and was discussed at some length by the Federal Court but final opinion was reserved.

Lands actually used for raising by cultivation food crops for men and beasts, as also other crops like jute, hemp, cotton and flax marketable commodities raised by the labour of man are no doubt agricultural lands. Lands which are used for purposes accessory to cultivation would, in our judgment, also be considered as agricultural lands—the threshing floor, irrigation tanks, land containing cattle sheds for plough cattle etc. We would also hold that the site of the hut, where the cultivator lives, is to be considered as agricultural land for the purpose of item 21 of List II. Where, however, a piece of land is not being actually used but is lying waste, its general nature and character must be the determining factor. Surroundings and situation would have an important bearing in such cases. A piece of fallow land in the middle of agricultural fields would have to be taken as agricultural land, for it is capable of being brought under tillage and would in all probability be brought under tillage and not used for building a residential house, if in future it is to be put to beneficial use. We would further hold that the general or wider and not the narrower meaning of the term "agriculture" should be

2. ('42) 29 A.I.R. 1942 F.C. 27 : I.L.R. (1942) Kar. F. C. 40 : I. L. R. (1942) Lah. 623 : 4 F. C. R. 53 (F. C.), Megh Raj v. Allah Rakhia.

adopted. That general meaning as stated in Oxford Dictionary, Vol. 1, p. 191 is

"the science and art of cultivating the soil ; including the allied pursuits of gathering in the crops and rearing live stock, tillage, husbandry and farming (in the widest sense)."

Lands used or lands though lying unused, but capable of being used, having regard to its general nature and character, for raising through the labour of man, food for men and beasts, food grains and vegetables and fodder, and other marketable commodities like cotton jute, hemp, flax etc., lands used as orchards, or for farming purposes, i. e., for raising or feeding of cattle and other live stocks as also lands used as accessory to the above purposes, e. g., irrigating tanks and sites used for the farmer's residence should be regarded as agricultural lands. Dwelling houses other than those used for residence of cultivators or farmers should be regarded as non-agricultural property. Within the term dwelling house must be included not only the structure used for residence and its site, but also adjacent buildings or outhouses, curtilage, garden, court-yard, orchard which is within what can be regarded as the compound of the house, and all that is necessary for the convenient use of the house. Lands which are being actually worked for minerals would be regarded as mines and so non-agricultural property, as also lands covered by forest, on the ground that forest produce is not raised by human labour. Possibly land used for planting trees for being used for fuel would be regarded as non-agricultural land as was held in 54 Mad. 900.³ Till the Provincial Legislatures legislate on the lines of Act 18 of 1937 and the amending Act of 1938, there would arise anomalies and difficulties in the matter of succession but the adoption of the wider import for the term 'agriculture' would reduce the anomalies to a great extent, and that is one of the main reasons why we adopt the wider meaning.

Applying what we have laid down above to the facts of this case, we hold in agreement with the lower Court that the items of property mentioned at pages 48 to 50 of the judgment of the lower Court dated 8th August 1942 (as printed in the paper book) are "agricultural lands." We, however, differ from that Court on the following matters: As the plaintiff led no evidence, the homesteads of under-tenants would not be excluded from the category of "agricultural land." They may as well be, and possibly the majority are homesteads of cultivators. Gardens and orchards which are outside of what can be regarded as the compound of the residential house of the

parties to the suit would not be excluded from the category of "agricultural land;" nor would pathways, khals and nullas, for they can be regarded as necessary accessories to agricultural lands. Subject to the aforesaid modification, the findings of the Subordinate Judge are confirmed. The plaintiff's one-fourth share is declared only in the dwelling house and its compound and all that appertain to it—that is to say to the house and its site and in the adjoining structures and their sites including cow-sheds, and c. s. dag No. 1565 of village Mochrakhend which contain the morais to the tanks, garden and orchard within the compound of the house and to the debasthans and their sites. The debasthans and their sites cannot be partitioned. She will be entitled to have partition of her share in the dwelling house and its compound with the appurtenances by metes and bounds. The dwelling house would not be taken to include the vegetable garden in c. s. dag No. 1553 of village Mochrakhend and the khamer shown in the sketch map mentioned at p. 46 line 27 of the judgment dated 8th August 1942 as printed in the paper book. The appeal is allowed to the extent indicated above. The parties would bear their respective costs in this Court and in the Court below up to this stage.

F. A. No. 152 of 1940—This appeal was preferred by the lunatic, Nilgobinda. He died on 21st September 1942 during its pendency without male issue. His widow Khantamoni, has been substituted in his place. The appeal is directed against that part of the judgment and decree of the learned Subordinate Judge dated 30th April 1940, by which his claim to get a separate allotment was refused. The learned Subordinate Judge held that Nilgobinda, though a lunatic, was entitled to a share in all the properties mentioned in the plaint. That finding has not been challenged before us. By reason of declaration of shares in the preliminary judgment and decree of the learned Subordinate Judge dated 30th April 1940, the property which belonged to her husband became his separate property from that date and therefore his share in all the properties in suit has devolved upon his widow under the Hindu law. She has thus acquired one-fourth share in some and one-third share in the rest. The question, therefore, is whether her claim to a separate allotment can be allowed. The reason, assuming it to be sound, given by the learned Subordinate Judge for refusing a separate allotment to her husband has disappeared with his death. A Hindu female, who has a widow's estate, is entitled to bring a suit for partition and to have her share separated by metes and bounds. It is also an established principle that a co-sharer,

3. (31) 18 A.-I. R. 1931 Mad. 659 : 54 Mad. 900, ChandraSekhara v. Duraiswami.

be he or she a plaintiff or defendant in a suit for partition, is entitled to claim a separate allotment at any stage before the final decree. The other defendants do not resist her claim to a separate allotment to those properties in which the plaintiff has a share. Their contention is that there cannot be in this suit partition by metes and bounds of those properties in which the plaintiff has no share and so in those properties neither Nil gobinda's widow nor any one of the other defendants can claim separate allotment. They contend that for partitioning those properties by metes and bounds a separate suit must be brought. We cannot accede to that contention. In this suit the question of title has been gone into and the result of our judgment is (1) that in some items of property, e.g., the dwelling house and its appurtenances and in debsthans the co-owners are the plaintiff and the defendants and that (2) in the rest of the properties in suit the co-owners are the defendants only. As a result of our findings the shares of the parties in the first mentioned properties are as follows: (a) plaintiff—one fourth share, (b) defendants 1, 2, 13 and 14—one fourth share, (c) defendants 3, 4 and 6 to 12—one fourth share, and (d) defendant 5's widow—one fourth share; and the shares of the parties in the remaining properties in suit are as follows: (a) defendants 1, 2, 13 and 14—one third share, (b) defendants 3, 4 and 6 to 12—one third share and (c) Khantamoyi (defendant 5's widow)—one third share.

We do not see any reason why we should drive the parties to a separate suit for partitioning the properties of the second class by metes and bounds when that can be done in this suit without greater expense or trouble. It is on the principle of shortening litigation by the avoidance of multiplicity of suits that we direct the partition by metes and bounds amongst the defendants of the rest of properties mentioned in the plaint in which the plaintiff has no share. Only debasthans, pathways, khals and nullas and such other properties which by their nature cannot be partitioned by metes and bounds or which for the convenience of parties or for other reasons should be kept joint will not be partitioned, but the rest of the property must be partitioned, and Khantamani as well as such of the other parties, who may so desire, be given separate allotments. The decree of the Subordinate Judge is modified accordingly. In this appeal also the parties must bear their respective costs throughout up to now. The costs of the final decree would be borne by the parties according to the value of their shares. As the case involves a substantial question as to the interpretation of the Government of India

Act, 1935, we certify that it is a fit case for appeal to the Federal Court.

R.K.

Order accordingly.

A. I. R. (31) 1944 Calcutta 426

SPECIAL BENCH

NASIM ALI, MITTER AND SHARPE JJ.

Brojendra Lal Ray, on his death, Swarnamayi Ray and others—Plaintiffs—Appellants

v.

Mubeswar Ali Choudhury and another—Defendants — Respondents.

Appeal No. 1547 of 1940, Decided on 29th August 1944, from appellate decree of Dist. Judge, Cachar, D/- 31st May 1940.

(a) Interpretation of statutes — Retrospective operation.

Provisions of a statute which touch a right in existence at the passing of the statute should not be applied retrospectively in the absence of express enactment or necessary intendment: (1905) A. C. 369 and ('27) 14 A. I. R. 1927 P. C. 242, *Foll.*

[P 427 C 1]

(b) Assam (Temporarily Settled Districts) Tenancy Act (3 of 1935), S. 44 — Pre-Act contracts about rent are not touched.

Section 44 contemplates amount of rent agreed upon between landlord and tenant or enhanced by Court after the Act. Hence contracts about rent after the Act only are hit by S. 44 and pre-Act contracts are not touched by this section. [P 427 C 2]

(c) Assam (Temporarily Settled Districts) Tenancy Act (3 of 1935), S. 1 (2) — Cause of action prior to Act — Act does not apply.

From the provisions of statute [Assam (Temporarily Settled Districts) Tenancy Act] which empowers the executive Government to fix by notification the date on which the Act is to come into operation it cannot be inferred that the Legislature intended the Act to apply to suits the cause of action of which arose before the Act came into force: ('44) 31 A.I.R. 1944 Cal. 162, *Rel. on.* [P 427 C 2; P 428 C 1]

Hemendra Kr. Das and Himanshu Ch. Choudhury — for Appellants.

Satyendra Kishore Ghosh — for Respondents.

Nasim Ali J.—This second appeal arises out of a suit for recovery of arrears of rent. The defendants took settlement of 16 bighas 15 cottas 9 chittaks of land in the district of Cutcher (a temporarily settled district in the Province of Assam) from the plaintiffs by executing a registered kabuliati on 10th Bhadra 1341 B. S., corresponding to 27th August 1934, for 15 years at an annual rent of Rs. 70. The Assam (Temporarily Settled Districts) Tenancy Act, 1935, came into force on 1st March 1937. On 26th July 1939, the plaintiffs instituted the present suit for recovery of arrears of rent from 1341 to 1345 B. S. at the stipulated rate of Rs. 70 per year. The defence of the tenants is

that they are not liable to pay more than Rs. 7-8-0 per year i. e., five times the annual revenue of the disputed lands in view of the provisions of S. 44 read with S. 3 (17) of the Assam (Temporarily Settled Districts) Tenancy Act, 1935. The Munsif held that the plaintiffs are entitled to recover rent at the rate of Rs. 70 per year for 1341 and 1342 B. S. and at the rate of Rs. 7-8-0 per year for 1343, 1344 and 1345 B. S. Two appeals were preferred before the lower appellate Court one by the landlords and the other by the tenants. The learned District Judge dismissed both the appeals and affirmed the judgment and decree of the Munsif. The present second appeal is by the plaintiffs. The defendants have also filed cross-objections. The contention of the plaintiffs in their appeal is that the Courts below were wrong in holding that the plaintiffs were not entitled to get rent for the years 1343-45 B. S. at the kabuliat rate. Section 44, Assam Tenancy Act, 1935, is in these terms :

"Except as provided for in Ss. 25 and 26, no rent agreed on between landlord and tenant or enhanced by Court shall exceed the maximum rent in respect of the land; nor shall any such amount which is in excess of the maximum rent be lawfully payable."

The words "maximum rent" have been defined in S. 3, cl. (17) of the Act thus :

"'Maximum rent or rate of rent' of agricultural holdings or parts thereof held on cash rent means a sum representing in the case of Cachar five times and in the case of other districts three times the revenue rate. Where agricultural holdings or parts thereof are held on produce rent 'maximum rent' means in the case of paddy one-half and in the case of jute one-third of the actual produce thereof."

Before the Act came into force, plaintiffs had the right to recover rent at the stipulated rate of Rs. 70 per year. The question is whether this right of the plaintiffs has been touched by S. 44 of the Act. Provisions of a statute which touch a right in existence at the passing of the statute should not be applied retrospectively in the absence of express enactment or necessary intendment: 1905 A. C. 369;¹ 54 I. A. 421.² Section 123 (i) (g) of the Act is in these terms :

"Nothing in any contract between a landlord and a tenant made before or after the passing of this Act shall entitle a landlord where the rent is payable in produce to recover as rent produce in excess of half (or in the case of paddy one-third) of the gross produce of the land for the year for which rent is claimed."

This section expressly takes away the pre-Act right of the landlord based on contract to recover produce rent in excess of half of the gross produce of the land. There is no provi-

sion in the Act which expressly takes away the pre-Act right of the landlord to recover cash rent at the contractual rate. The contention of the tenants however is that the necessary implication of the words "nor shall . . . be lawfully payable" in the last part of S. 44 is that the section is retrospective in its operation. The words "any such amount" after the word "shall," mean "amount of rent agreed on between landlord and tenant or enhanced by Court." Before the Act came into force the Court had no power to enhance the rent. The Act for the first time empowers the Court to enhance the rent. The section therefore contemplates amount of rent agreed upon between landlord and tenant or enhanced by Court after the Act. We are therefore of opinion that contracts about rent after the Act are hit by S. 44 and that pre-Act contracts are not touched by this section. This view finds support from the omission of cash rent in S. 123 (g) of the Act. The plaintiffs are, therefore, entitled to recover rent at the contractual rate, i. e. Rs. 70 per year for the entire period in suit. The defendants in their cross-objection urge that the Courts below should have held that the plaintiffs' claim for rent for 1341 and 1342 is barred by limitation. Before the Assam Tenancy Act came into force the period of limitation for recovery of arrears of rent was six years. The Assam Tenancy Act, however, has reduced this period to three years. The Act was passed in 1935. Section-1 (2) of the Act is in these terms : "It shall come into force on such date as the Local Government may by notification appoint in this behalf." By notification under this section, the Act came into force on 1st March 1937. The cause of action for recovery of arrears of rent for 1341 and 1342 arose before the Act came into force. A right of suit is a vested right. The question is whether there is anything in the Assam Tenancy Act which shows that this vested right was taken away by the Act. There is no provision in the Act which expressly takes away this vested right. It is contended on behalf of the defendants that the necessary implication of the provision in S. 1 (2) of the Act that the Act shall come into operation at a date to be notified by the Local Government is that the Legislature intended that the period of limitation would apply to suit, the cause of action of which arose before the Act. In 48 C. W. N. 266³ it has been held by a Division Bench of this Court that from the provision of a statute (Sylhet Tenancy Act 1936) which empowers the executive Government to fix by notifica-

1. (1905) 1905 A. C. 369, Colonial Sugar Refining Co. Ltd. v. Irving.

2. ('27) 14 A.I.R. 1927 P. C. 242 : 9 Lah. 284 : 54 I. A. 421 (P. C.), Delhi Cloth and General Mills Co. Ltd. v. Income-tax Commissioner, Delhi.

3. ('44) 31 A.I.R. 1944 Cal. 162 : 48 C. W. N. 266, Iswar Chandra Pal v. Pritilata Biswas.

tion the date on which the Act is to come into operation it cannot be inferred that the Legislature intended the Act to apply to suits the cause of action of which arose before the Act came into force. We are of opinion that this view is quite correct. We accordingly hold that the plaintiffs' claim for recovery of arrears of rent for 1341 and 1342 is not barred by limitation. The result therefore is that the cross-objections are dismissed and the appeal is allowed. Plaintiffs' suit is decreed in full with costs in all the Courts. There will be no order for costs in the cross-objections.

Mitter J. — I agree.

Sharpe J. — I agree.

R.K.

Order accordingly.

A. I. R. (31) 1944 Calcutta 428

MITTER AND AKRAM JJ.

Durga Das Pan, Defendant 2 and others
— Appellants

v.

*Santosh Kumar Pan minor represented
by Sm Uma Sundari Ghose, Plaintiff
and others — Respondents.*

Appeals Nos. 142 and 208 of 1942, Decided on 14th March 1944, from original decrees of Sub-Judge, Howrah, 1st Court, D/- 27th February 1942.

(a) Hindu law — Adoption — Bachelor can adopt.

A bachelor can adopt. No disqualification can be imposed where none is expressly imposed by either the Rishis or by the ancient commentators, on the ground that a son adopted by a bachelor cannot offer pindas to his maternal ancestors in the family of adoption : *Case law and Text Books referred.*

[P 431 C 2]

(b) Hindu law — Applicability.

Sadgopes are Sudras and not Vaisyas. [P 432 C 1]

Chandra Sekhar Sen and Ranjit Kumar Banerjee (in 142); and Dr. R. B. Pal and Shambunath Banerjee (Sr.) (in 208) —

for Appellants.

Sitaram Banerjee, Dharendra Nath Sarkar, Shambhunath Banerjee (Sr.), Sachindra Ch. Das Gupta, Nanda Lal Roy, Gurudas Bhattacharjee and Rama Prosad Bagchi (in 142), and Ranjit Kumar Banerjee, Dharendra Nath Sarkar and Gurudas Bhattacharjee (in 208)

— for Respondents.

Judgment.—Mahendra Nath Pan had two sons, Krishnadhane and Durgadas. Krishnadhane married twice. By his first wife he had a son Kamalakanta and a daughter Uma Sundari and by his second wife, Nivarani, he had a son Bimalakanta. Uma Sundari has been married to Benoy Krishna Ghosh, and Santosh, the plaintiff in the suit, is their son. Krishnadhane died intestate on 6th October 1931 leaving him surviving his two minor sons Kamalakanta and Bimalakanta and his

father Mohendra. In 1932 on his own application Mohendra was appointed guardian of the person and property of the said two minor sons of Krishnadhane by the District Judge of Howrah. On 14th August 1933 he as guardian of the said two minors joined in the execution of two documents—Ex. 9, a deed of partnership, and Ex. 10, a deed of relinquishment. The first mentioned document was executed by Jotindra Mohan Mondal as first party, by his son Durgadas Pan as second party and by himself as guardian of Kamala Kanta and Bimala Kanta as third party. The second document was executed by Durgadas Pan and was accepted by Mohendra as guardian of his wards.

There was a flourishing business in cane carried on under the name and style of James Pyne & Co. at 71/E Clive Street, Calcutta. It was admittedly a partnership business and Jotindra Mohan Mondal was admittedly a partner with 8 annas share. It is the plaintiff's case that the other partner was Krishnadhane and neither Mohendra nor Durgadas had any interest in that firm, and the latter was only a paid assistant. In Ex. 9, the deed of partnership, it is recited that the said business was a partnership business of Krishnadhane and Jotindra Mondal and that Krishnadhane and Jotindra had equal shares therein, that after Krishnadhane's death his minor sons, Kamala Kanta and Bimala Kanta, were in possession of 8 annas share, and Jotindra Mohan Mondal of the other 8 annas share of the said business, that thereafter a serious quarrel arose between Durgadas and the said two minor sons of Krishnadhane over the 8 annas share which belonged to Krishnadhane. The deed further recites that those quarrels were settled by Mohendra agreeing to give to Durgadas 1/6th share in the business. By the terms of the deed Jotindra Mohan Mondal was to have half share, Kamala Kanta and Bimala Kanta were to have 1/3rd share between them and 1/6th share was to belong to Durgadas. Exhibit 10 was executed by Durgadas on the same date on which Ex. 9 was executed. By it Durgadas relinquished his claim to comparatively small items of property in favour of the minors Kamala Kanta and Bimala. In consideration thereof Mohendra as their guardian gave 1/4th share of many valuable properties which stood in the name of Krishnadhane to Durgadas and the remaining 3/4th share therein was retained by him for the said two minors. All the properties which were the subject-matter of that deed had been acquired in Krishnadhane's name out of the profits of the cane business carried on in the name and style of James Pyne & Co. In 1934 Mohendra died.

According to the plaintiff Kamala Kanta adopted him on 3rd July 1935. It is the common case that Kamala Kanta was then just over 17 years of age and was a bachelor. He was in the last stage of tuberculosis and died a bachelor on 18th July 1935, ten days after the alleged adoption. On 18th February 1936 Santosh claiming as the adopted son of Kamala Kanta instituted the suit in which this appeal arises. Bimala Kanta, Durgadas, Nivarani (Krishnadhane's surviving widow) and Jotindra Mohan Mandal are defendants 1 to 4 respectively. In the plaint he challenged Exs. 9 and 10 as fraudulent documents and prayed for cancellation thereof. He prayed for a declaration that the business of James Pyne & Co., has been dissolved, alternatively for its dissolution, and for accounts of the business. He also prayed partition of other properties, moveable and immovable—which are mentioned in schedules Kha to Uma of the plaint, on the footing that he and Bimala have each eight annas share therein on the basis that they were Krishnadhane's properties.

All the defendants contested the suit. All of them contended that the plaintiff had not been adopted by Kamala Kanta at all and that at the time of the alleged adoption Kamala Kanta had no mental capacity, he having become unconscious some days before the alleged date of adoption and remained so till his death. Alternatively, they pleaded that if the fact of adoption be proved and that Kamala Kanta had at that time mental capacity the adoption was in law invalid, their case being that the plaintiff being a sister's son of Kamala Kanta was ineligible for adoption as the parties who are Sadgopes by caste are not Sudras but Vaisyas. Defendant 1 and his mother defendant 3 remained neutral with regard to the deeds Exs. 9 and 10, but defendant 2 Durgadas and 4 Jotindra Mohan Mandal made a common cause. Their case was that Mohendra and not Krishnadhane was the partner of Jotindra Mohan Mandal in the business of James Pyne & Co. On that footing Durgadas claimed $\frac{1}{4}$ th share therein. The learned Subordinate Judge has held that Kamala Kanta had in fact adopted the plaintiff and that he had at the time full mental capacity, that the business belonged to Krishnadhane and Jotindra Mohan Mandal in equal shares and not to Mohendra and Jotindra Mohan Mandal, that the deeds Exs. 9 and 10 were fraudulent deeds executed by Mohendra with the reprehensible motive of benefiting his own son, Durgadas, at the expense of his wards, Kamala Kanta and Bimala Kanta. He has set aside those documents. He declared the business carried on under the

name of James Pyne & Co. to be dissolved and directed the taking of accounts of that business and distribution of the assets thereof in the proportion of 4 annas to the plaintiff, 4 annas to defendant 1 and 8 annas to defendant 4. He directed partition between plaintiff and defendant 1 in equal shares of all the properties in suit, save and except those described in schedule Uma (amended, *vide* order of Court dated 22nd May 1944) and some items of immovable property in which persons other than the parties to the suit also had shares. Against the decree two appeals have been filed, one, No. 142 of 1942, by Durgadas and the other No. 208 of 1942 by Bimala Kanta and his mother Nivarani. Both sets of appellants admit before us the correctness of the finding of the learned Subordinate Judge that the plaintiff was in fact adopted by Kamala Kanta and that Kamala Kanta had at the time full mental capacity. They challenged the adoption on two grounds only, namely, (i) that the adoption is invalid on the ground that a bachelor is incompetent to adopt, and (ii) that Sadgopes are Vaisyas and so the plaintiff being the sister's son of Kamala Kanta was ineligible.

The appellants in Appeal No. 208 of 1942 have not urged any other point. Mr. Sen appearing for the appellant in the other appeal, namely, for Durgadas, states before us that he cannot on the evidence as it stands challenge the finding of the learned Subordinate Judge that Krishnadhane and not Mohendra was the co-partner of Jotindra Mohan Mandal and that he cannot also challenge the finding of the learned Subordinate Judge that the properties in respect of which the learned Subordinate Judge has passed his decree for partition in favour of the plaintiff were Krishnadhane's. He, however, contends that the deeds Exs. 9 and 10 are deeds binding on the minors, as those deeds were executed by Mohendra with the intention of benefiting his wards and not with a fraudulent intention, and they had in fact benefited them. We may at once say that we cannot accept this contention of the appellant for the following reasons :

(i) that it is a new case set up for the first time before us. His client's case in the lower Court was that business belonged to Mohendra and Jotindra Mohan Mandal, a case which is now abandoned; (ii) on the admission that the business belonged to Krishnadhane and the immovable properties which had been acquired in Krishnadhane's name were Krishnadhane's, there can be no question that Ex. 10 was a fraudulent document. In his application for guardianship Mohendra admitted the properties covered by Ex. 10 to be Krishnadhane's.

The recitals in Ex. 10 to the effect that Krishnadhane in whose name those properties stood was his benamdar was a false statement and known to Mohendra to be false; (iii) Exhibit 9 was also a fraudulent document. It was executed on the same date as Ex. 10. The two documents were parts of the same design, which was to deprive the minors, Kamala Kanta and Bimala Kanta of their just rights and at their expense to enrich Durgadas. There were gross dereliction of duty on the part of Mohendra, their certificated guardian. He executed the documents Exs. 9 and 10 on false recitals. There was no dispute or quarrel with Durgadas at or before the execution of those documents or at any time during Mohendra's life-time. That is the admission of both Durgadas and Jotindra in their evidence.

The consideration recited in those documents was accordingly false. It is unnecessary for us to discuss the point in greater detail. We agree with the learned Subordinate Judge that the evidence establishes the fact that both the documents, Exs. 9 and 10, are fraudulent documents executed by Mohendra with a view to prefer his own son Durgadas at the expense of his wards. By those documents he dealt with his wards' properties but the learned District Judge who appointed him their guardian was not informed and no sanction was applied for or obtained from him. The decree passed by the learned Subordinate Judge must therefore be maintained unless the adoption of the plaintiff be held to be illegal on the grounds urged before us, which we have noticed above. The Madras, Bombay and Allahabad High Courts have decided that a bachelor can adopt. There is no decision in this Court. In 2 Ind. Jur. (N. S.) 24¹ a case of simultaneous adoption of two boys by a person having two wives—Phear J. in repelling the contention that a man having two wives could validly adopt two sons, one for each wife, observed that in an adoption the wife does not count, and supported his conclusion by saying that a bachelor could make a good adoption, but Peacock C. J., Trevor and Pundit JJ. who heard the appeal expressed no opinion on the point. Peacock C. J. expressly stated that he concurred with the decree made by the trial Judge without expressing entire concurrence with his reasonings. In this state of things the question whether a bachelor can adopt so far as this Court is concerned, is still an open question.

The cases in the Bombay, Allahabad and Madras High Courts in which the question has been considered are 2 M. H. C. R. 367,² 4 M. H.

1. ('67) 2 Ind. Jur. (N. S.) 24, Monemothanauth v. Ononthanauth.

2. ('65) 2 M. H. C. R. 367, Nagappa Udapa v. Subba Sastri.

C. R. 270³ at p. 273, 12 ALL. 328⁴ at p. 358, 12 Bom. 329⁵ and 56 Mad. 759⁶ at p. 778. The view expressed in those decisions rests ultimately on the opinion expressed by Macnaughten (Hindu Law, Chap. VI), Strange (Hindu Law, Vol. 1, pp. 65, 66, 1825 Edn.), Sutherland (Appendix Note 4) and Jagannath (Colebrookes Digest, vol. 3, pages 330-31). They are very high authorities on questions of Hindu law. In *Rangama v. Atchama*,⁷ where the question was whether a man having an adopted son living could adopt another son the Judicial Committee of the Privy Council recognized Macnaughten and Sutherland to be very high authorities. The view that a bachelor can adopt is also expressed by Mr. Shyama Charan Sarkar in his *Vyavastha Darpan* (Vol. 1, S. 323, pages 284-85). He supports his view by *Vyabasthas* (Vol. II, page 504, 3rd Edn.). Dr. Jogendra Chandra Bhattacharjya and Mr. Golap Chandra Sastri notice the fact, which Jagannath also does, that the boy adopted by a bachelor would have no maternal side in the adoptive family, with the result that no pindas can be offered to his maternal ancestors by adoption. Jagannath gets over the difficulty by the hypothesis, which in view of the decisions of this Court and of the Judicial Committee of the Privy Council, cannot be now held to be sound, that the natural mother of the boy would in such a case be regarded as his mother even after the adoption, but Mr. Golap Chandra Sastri considers that to be a real difficulty and though not quite definite in his opinion, indicates an inclination against the capacity of such a person to adopt. That is also the inclination of Dr. Bhattacharya but by expressing the view that a bachelor can adopt in exceptional circumstances he has in effect said that celibacy cannot be regarded as an absolute disqualification. West and Buhler and Mayne have expressed opposite opinions.

There is no expression of opinion either way on the question in the *Dattaka Mimansa* or the *Dattaka Chandrika*. Stanzas 21 and 22 of S. 1 of the former book do not in our judgment suggest by necessary implication that a bachelor cannot adopt. In that part of S. 1, Nanda Pandit was considering the question whether a wife can adopt without the consent of her husband. He expressed the view that she could not, for in the matter of filiation, as in the case of secondary sons of other descriptions recognized in the ancient Hindu law, "the husband

3. ('69) 4 M. H. C. R. 270, Chandrasekharudu v. Bramhanna.

4. ('90) 12 All. 328 (F.B.), Tulshiram v. Beharilal.

5. ('88) 12 Bom. 329, Gopal Anant v. Narayan Ganesh.

6. ('33) 20 A.I.R. 1933 Mad. 550 : 56 Mad. 759 (F.B.), Sownthara Pandian v. Periaiveeru.

7. ('67) 4 M. I. A. 1 (P. C.).

is the prime author of the act (of filiation) and the wife is only the instrumental means." He pointed out that his view on the point was not inconsistent with the view that a husband could adopt without the concurrence of his wife, as "by reason of superiority of the husband by his mere act of adopting the filiation of the adopted as son of his wife is completed." Having regard to the question he was discussing existence of a wife must of necessity be assumed and in those stanzas the effect of the adoption by the husband without the wife's consent in relation to her is stated. From those stanzas, it does not therefore follow by necessary implication that a bachelor cannot adopt. If, however, that be taken to be the necessary implication from those stanzas the necessary implication would also be that a man cannot adopt when his wife is dead and when he has not taken another wife, but it is settled law that a widower can adopt and the difficulty of finding the maternal line in the adoptive family is solved by making the dead wife of the adopter the mother of the adopted boy.

A son is desired for three reasons: (1) for continuing the lineage, (2) for the purpose of spiritual welfare and (3) for secular purposes, and an adoption is sanctioned for the purpose of fulfilment of these objects when there is no natural born son. "A son of any description should anxiously be adopted by a sonless man for the sake of funeral cake, libation of water and exequial rites and for the celebrity of the name"—Manu. A son taken by a bachelor fulfils the first and the third objects. From the secular aspect there cannot be any objection to the validity of such an adoption and as by his own progeny the adopted son would continue the line of his adopter the celebrity of the name of his adoptive father would be maintained. The only question is, can a son taken by a bachelor fulfil the second object—the spiritual object—an object that cannot be ignored, as has been pointed out by the Judicial Committee in 60 I. A. 242.⁸ It is necessary therefore to examine the precise scope of the spiritual aspect. It is obligatory for a Hindu to have a son. A Brahman, says Manu, is born a debtor to three classes—to the Rishis, to the Gods and to his ancestors, the first debt is discharged by reading the Sastras, the second by performing sacrifices and the third by begetting offsprings. By a son the father saves his soul from falling into the region of torment. Where therefore a person has no aurasa son but creates a substitute by adoption he does the act primarily for his own spiritual wel-

fare. That act would no doubt result in conferring benefits on the adopter's ancestors, for the adopted son would offer to them pindas at the Parvana Sradh but the benefit so conferred is in a sense only consequential.

In 4 M.I.A. 7¹ where a husband had adopted a boy without the concurrence of his wife the Right Hon'ble Mr. Pemberton Leigh in delivering the judgment of the Board observed that an adoption is solely made to the husband and for his benefit. All the texts which have been summarised by the Judicial Committee of the Privy Council in 60 I. A. 242⁸ at p. 248 of the report bring out the idea of prime benefit to the adopter. On these grounds we do not think a disqualification can be imposed where none is expressly imposed by either the Rishis or by the ancient commentators, on the ground that a son adopted by a bachelor cannot offer pindas to his maternal ancestors in the family of adoption. He would have no maternal ancestors in that family at the time of his adoption as his adopter was an unmarried man at the time. But the time for offering pindas would only arrive on the death of his adoptive father and there would still be a possibility of his having maternal ancestors in that family, for after his adoption and before his death his adoptive father may well take a wife. That wife would be considered his mother in the adoptive family and her paternal side would be his maternal ancestors. The view we are taking is not against the text of Raghunandhan (Sradha Tatwa, p. 8, edition by Pandit Hrishikesh Sastri). The text which is based on Vriddha Jajnavalkya says that no distinction is to be made between the paternal and maternal side in offering pindas, and if any is made the man so making it would go after his death to the place of greatest torment (Visesa Narak). It proceeds upon the assumption, which is a normal fact, that there is a paternal and a maternal side of the person offering pindas.

We accordingly overrule this point and hold that a bachelor can adopt. The next question is whether the parties are Vaisyas. They are Sadgopes by caste. In Risby's book (Vol. I, p. 1 i and Vol. II, page 212, and 261), also in the Census Report (Vol. V, p. 404) they are classed as one of the Navasakhas of the Sudra community. Just before the last census a resolution was passed on 16th February 1936 by the All Bengal Sadgope Conference (Ex. R) in which it was asserted that Sadgopes are Vaisyas. In our judgment no importance can be attached to that resolution for it is common experience that just before the decennial census operations, castes whose practices conform to the usages of

8. ('33) 30 A. I. R. 1933 P. C. 155; 60 I. A. 242, Amarendra v. Sanatan Singh.

Sudras make claims to higher status. The real tests in such cases would be to see (a) how they treat themselves, (b) how persons of other communities treat them and (c) their own practices (52 Bom. 497.)⁹ Naninal Ghosh, the Secretary of the All Bengal Sadgope Conference, has been examined as a witness for the defendants. He admits that marriages between boys and girls of the same gotra are prevalent in his community and are recognized as valid marriages. D. W. 1, Debendra Kour, an old man of that community, admits that Sadgopes of Bengal are known as Sudras and all other communities treat them on that footing. The evidence of D. W. 3 Benoy Ghose is to the same effect. There is also one sided evidence that mourning is observed for 30 days. On this evidence we hold in agreement with the learned Subordinate Judge that Kamala Kanta was a Sudra. The adoption of the plaintiff is a valid one and he is entitled to all that belonged to his adoptive father, Kamala Kanta. The result is that both the appeals are dismissed but without costs.

R.K.

Appeal dismissed.

9. ('28) 15 A. I. R. 1928 Bom. 295: 52 Bom. 497, Subrao v. Radha.

A. I. R. (30) 1944 Calcutta 432

B. K. MUKHERJEA AND BLANK JJ.

Narayan Chandra Laik and others —
Objectors — Appellants

v.

New Birbhum Coal Co. Ltd. —
Respondents.

Appeals Nos. 241, 242 and 243 of 1941, Decided on 23rd March 1943, from original orders of Sub-Judge, Burdwan at Asansol, D/- 28th June 1941.

Execution — Execution against insolvent's property—Death of insolvent—Heirs claiming no interest in insolvent's property as heirs — Procedure.

Where in the course of the execution proceedings against his property the insolvent dies and his heirs do not claim any interest in the property as his heirs, the proper procedure would be to strike out the names of the heirs of the deceased from execution proceedings altogether. The decree-holder would be entitled, provided that the leave obtained by him, allows him to do so, to proceed against the properties of the insolvent in the hands of the Official Assignee. [P 432 C 2]

Chandra Sekhar Sen, Apurbadhan Mukherjee and Bireswar Chattopadhyaya — for Appellants.

Gopendra Nath Das and Jagadish Chandra Ghosh — for Respondents.

B. K. Mukherjea J. — On hearing the learned advocates for the parties, it seems to

us that the appellants who are sought to be substituted as heirs of the deceased Ashutosh Laik, insolvent, are neither proper nor necessary parties to the execution proceedings. The deceased Ashutosh Laik was adjudicated an insolvent under the Presidency Towns Insolvency Act on 2nd February 1934, and all his properties vested in the Official Assignee. On 15th March 1938, the decree-holders respondents obtained from this Court in its insolvency jurisdiction permission to proceed in execution against the properties of the insolvent in the hands of the Official Assignee. In pursuance of this permission, execution proceedings were started, and pending these proceedings, Ashutosh Laik died. The heirs, including his three sons and his wife do not claim any interest in these properties as heirs of the insolvent. The widow claims certain interest as an under-tenure holder by a deed which was executed several years prior to the execution proceedings and which was not challenged by the Official Assignee. There is another claimant in the shape of the deity, and the deity claims an interest in the properties on the strength of a certain arpannama.

In our opinion, the proper procedure would be to strike out the names of the four heirs of deceased Ashutosh Laik from execution proceedings altogether, and it must be taken that they disclaim all interest in these properties as heirs of Ashutosh Laik. The decree-holders would be entitled, provided that the leave obtained by them, allows them to do so, to proceed against the properties of the insolvent in the hands of the Official Assignee. If the Official Assignee disclaims any interest in these properties, the decree-holders may take such steps, if any which they are entitled in law to take. If any of the properties are attached which the deity or the widow claims, on the strength of antecedent transactions which are not affected by the insolvency proceedings, they will be entitled to put forward their claims or take other steps as they may be advised to take. The order of the Court below making substitution is set aside. This order will govern all the three appeals before us. We make no order as to costs in these appeals.

Blank J. — I agree.

G.N.

Order accordingly.

A. I. R. (31) 1944 Calcutta 433

DAS J.

*In the matter of Lovejoy Patell
and another.*

Application in Ordinary Original Civil Jurisdiction,
Decided on 31st March 1943.

(a) Guardians and Wards Act (1890), S. 9—
Application for appointment as guardian of minor
—Minor's ordinary place of residence determines
jurisdiction of Court—Temporary residence else-
where at date of application does not affect juris-
diction.

It is the ordinary place of residence of the minor
which determines the jurisdiction of the particular
Court to entertain the application by a person for ap-
pointment as guardian of the minor. Such jurisdic-
tion cannot be taken away by temporary residence
elsewhere at the date of the presentation of the peti-
tion : ('40) 27 A. I. R. 1940 All. 329, *Rel. on.*

[P 435 C 2; P 436 C 1]

From 1938 to February 1942 the minors ordi-
narily resided and attended schools in the town of
Calcutta within the jurisdiction of the Calcutta High
Court. Then they were sent to Darjeeling for educa-
tion. They lived there upto November 1942 when on
account of the annual vacation they came down to
the applicant's place of residence in Beadon Street
which was within the jurisdiction of the Calcutta
High Court. There they lived upto January 1943.
The applicant applied to the High Court for her ap-
pointment as guardian of the person of the minors
on 8th March 1943 :

Held that the minors ordinarily resided within the
ordinary original civil jurisdiction of the Calcutta
High Court and therefore the High Court had juris-
diction to entertain the petition. [P 436 C 1]

(b) Letters Patent (Cal.), Cls. 11 and 34.

Clause 11 does not control Cl. 34. [P 436 C 1]

(c) Letters Patent (Cal.), Cl. 17—Appointment
of guardian of person and estate of minor—
Jurisdiction of Calcutta High Court—Extent of.

The jurisdiction of the Calcutta High Court to
appoint guardian of the persons and estates of minors
is not limited to minors residing within its ordinary
original civil jurisdiction but extends to minors
residing outside it but within the Bengal Division
of the Presidency provided they are British subjects :
('30) 17 A.I.R. 1930 Cal. 598; ('37) 24 A. I. R. 1937
Mad. 51 and ('41) 28 A. I. R. 1941 Bom. 397 (S.B.),
Rel. on.; 21 Cal. 206 and ('32) 19 A. I. R. 1932 Cal.
91, *Not approved.*

[P 436 C 2; P 437 C 2]

(d) Letters Patent (Cal.), Cl. 17—Appointment
of guardian of person and estate of minor under
Cl. 17—High Court will follow principles adop-
ted by Court of Chancery in England — Guar-
dians and Wards Act how far applicable.

In exercising the jurisdiction under Cl. 17 in the
matter of appointment of a guardian of the person
and estate of minor, the High Court should follow the
principles adopted by the Court of Chancery in Eng-
land. This jurisdiction of the High Court has been
expressly preserved by S. 3, Guardians and Wards Act.
This does not, however, mean that the High Court
ignores the principles embodied in that Act. The
provisions of that Act in effect adopt the cardinal
principles upon which the Court of Chancery in Eng-
land used to act. Where the Act is silent or the pro-
visions thereof are contrary to or inconsistent with
the principles of the Court of Chancery, the High
Court in appropriate cases will act on the principles
on which the Court of Chancery in England would
act in similar circumstances. [P 437 C 2]

1944 C/55 & 56

(e) Mahomedan Law—Minor — Persons enti-
tled to custody of — Order of.

According to the indigenous Mussalman law the
mother is entitled to the custody of her male child
until he has completed the age of 7 years and of her
female child until she has attained puberty. Failing
the mother, the custody of a boy under the age of 7
years and of a girl who has not attained puberty be-
longs to certain female relations in preference to the
father. The father is entitled to the custody of a boy
over 7 years and of an unmarried girl who has
attained puberty. [P 437 C 2; P 438 C 1]

(f) Mahomedan Law — Minor — Minority of
male or female when terminates — Puberty and
majority are same — Effect of Indian Majority
Act.

According to the Mussalman law the minority of a
male or female terminates when he or she attains
puberty. Puberty and majority, in the Mussalman
law, are one and the same. Among the Hanafis and
the Shias puberty is presumed on the completion of
the 15th year. In default of evidence as to puberty
a minor of either sex is considered adult on the com-
pletion of 15th year. Under the Mussalman law
any person who has attained puberty is entitled to
act in all matters affecting his or her status or his or
her property. This indigenous Mussalman law has
been materially altered by the Indian Majority Act
and the only matters in which a Mahomedan is now
entitled to act on attainment of puberty are,
(1) marriage, (2) dower and (3) divorce. In all other
matters his minority continues until the completion
of 18 years. [P 438 C 1]

(g) Minor—Appointment of guardian of—Prin-
ciples on which Court at Common law in Eng-
land acts, indicated.

According to the law of England the father has
the control over the persons, education and conduct
of his children until they are 21 years of age. If a
child is taken away from the father, the father has
the right to come to Court and ask for return of the
child to him. The question mainly arose in cases
where the father sued out a writ of habeas corpus.
At Common law the right of the father and of the
mother, as guardian for nurture, after the death of
the father, there being no testamentary guardian,
was treated as paramount and could be enforced by
writ of habeas corpus. In those cases, if the child was
a male child above 14 years or a female child above
16 years the Court would consult their wishes and if
the Court was satisfied that such a child desired to be
where it was, then the Court would not make any
order in favour of the parent, because in those cir-
cumstances the very ground of an application for a
habeas corpus, namely that the child was in illegal
custody without his consent, did not subsist. If, how-
ever, the child was below the age, viz., below 14
years in the case of a male child and below 16 years
in the case of a female child, the Common Law Court
had no jurisdiction to refuse the prayer of the parent
unless cruelty or contamination from gross immora-
lity of the parent or guardian was to be apprehended.
The principle on which the Common Law Court
acted was that the parents, as against other persons,
generally had an absolute right to the custody of the
children unless he or she had forfeited it by some
gross misconduct. This absolute right of the parents
was recognised because such a right was necessary
for preserving the natural order and course of the
family life which is the foundation of the society and
the Court of Common Law did not interfere with
parents except upon grave occasions or for reasons of
urgency. [P 438 C 1, 2]

(h) Minor—Appointment of guardian of person
and property of minor — Principles on which

Court of Chancery in England acts indicated.

The Court of Chancery in England exercised paternal jurisdiction over infants derived from the prerogative of the Crown as *parens patriæ*. The Court of Chancery has never disregarded the ties of affection or the prima facie right of the parents over the person, education and conduct of child. It has recognised that generally speaking, the best place for a child is with its parents. It has never said merely because the parents are poor and the person who seeks to have the custody of the child as against the parents is rich, that without regard to the natural rights and feelings of the parents the child ought to be taken away from its parents merely because its pecuniary position will be thereby bettered. On the other hand, when the welfare of the child has demanded it the Court of Chancery has never hesitated to exercise its jurisdiction nor has it consented to limit its jurisdiction to interfere with the parental rights only to gross misconduct of the kind such as the Common Law Court would consider sufficient to destroy the prima facie rights of the parents. Accordingly the Court of Chancery even on application by the parents by habeas corpus has interfered and deprived the parents of the custody of the child when it has been satisfied that it is clearly right for the welfare of the child in some very serious and important respects that parents' rights should be suspended or superseded although the parents have not been guilty of any misconduct which alone would disentitle them to the custody of the child in Common law. The grounds on which the Court of Chancery has interfered with parents' rights are: (1) unfitness in character and conduct, e. g., that the parents have been guilty of cruelty or immorality, (2) unfitness in external circumstances, e. g., poverty combined with other reasons, (3) waiver of their rights, e. g., allowing the child to be brought up in a higher social position, (4) agreement between husband and wife on marriage or on separation or agreement by father with a third party where the agreement has been acted upon, so that a revocation of it would injuriously affect the child and (5) where the father is or intends to go out of the jurisdiction: *Case law referred.* [P 438 C 2; P 439 C 1, 2]

(i) Letters Patent (Cal.), Cl. 17 — Boy brought up by father for first eight years—Then custody and education of boy taken over by third person—Father paying for maintenance and education of child — Father held not disqualified from asserting natural right to be guardian.

A boy born in 1929 was maintained and brought up by his father for the first eight years of his life. The custody, care and education of the child were then taken over by a third person who was on very intimate terms with the parents of the child. The father to the best of his ability had been defraying the expenses of the maintenance and education of the child, and recognised his responsibility therefor. On the application by the third person for his appointment as guardian of the person of the minor boy in 1943 when the boy was just over 14 years :

Held that it could not be said that the father had failed or neglected to discharge his natural duties towards the boy to such an extent as would disqualify him from asserting his natural rights as the father of the child. In other words there was no abdication of the rights of the father over his boy. The father therefore was not unfit to be guardian of the person of the boy either within the meaning of S. 19, Guardians and Wards Act or according to the principles on which the Court of Chancery in England would interfere with the rights of the father.

[P 440 C 2; P 441 C 1]

(j) Letters Patent (Cal.), Cl. 17 — Promise by parents to give their child to third person to be

brought up by latter as his own — Validity and importance of.

A promise by the parents to give away their child to a third person to be brought up by the latter as his own has no legal effect as an agreement, for no Court of Chancery would specifically enforce such agreement and thereby compel the parents to abdicate their sacred duties and rights as such parents. The parents can at any time before such a promise has been acted upon revoke and repudiate such promise. Such a promise is of importance only as a matter of inducement, a starting point, to explain the subsequent events and the conduct of the parties.

[P 441 C 2]

(k) Letters Patent (Cal.), Cl. 17 — Soon after birth, care and custody of female child given to third person as permanent arrangement for her future life — For next 14 years child brought up, maintained and educated by third person at her own expense — Welfare of child held required that father should not be allowed to re-assert his natural rights which he had forfeited.

Soon after the birth of a female child in 1929 the parents gave the care and custody of the child to a third person who was in fairly affluent circumstances not as a temporary measure but with a view to make a permanent arrangement for her future life, and for the next 14 years except for a brief period of five months the child had lived and remained with that person who had brought her up with the utmost care and affection, had maintained her entirely at her own expense and had educated her as if the female child were her own child. This long-continued acquiescence on the part of the parents had given rise to associations and expectations in the mind of the female child that she would be continued to be brought up in the way she had been brought up by the third person. On the application of the third person in 1943 for her appointment as guardian of the female child :

Held that financial expectation in the mind of the child was not necessarily the only expectation which the Court of Chancery had declined to frustrate or disappoint. By long acquiescence and through no other fault or misconduct of his own, the father had placed himself in such a position with regard to the female child that he had forfeited his natural rights and rendered himself unfit to be the guardian of the person of the female child and the welfare of the child required that he should not be permitted to re-assert his original rights as father : (1893) 2 Q.B.D. 232, *Approved*; (1883) 24 Ch. D. 317; (1926) 1 Ch. D. 676 and ('14) 1 A.I.R. 1914 P. C. 41, *Disting.*

[P 443 C 1, 2; P 444 C 1]

(l) Letters Patent (Cal.), Cl. 17 — Minor—Appointment of guardian—On application of stranger Court will not appoint him as mere keeper or custodian of minor instead of as guardian.

The High Court, acting on the principles of the Court of Chancery in England, will not on the application of a stranger appoint such stranger as mere keeper or custodian of the minor instead of being appointed as full-fledged guardian : ('25) 12 A. I. R. 1925 Oudh 282, *Approved*.

[P 444 C 1]

(m) Letters Patent (Cal.), Cl. 17—Minor female child—Appointment of guardian of — Court can take into consideration opinion of child even if below 16 years.

In the matter of the appointment of a guardian of the person of a minor female child under Cl. 17 the High Court can speak to and consider the opinion of the child even if she is below 16 years of age : ('24) 11 A.I.R. 1924 Mad. 873 and ('35) 22 A. I. R. 1935 Mad. 363, *Rel. on.*

[P 444 C 2]

Barwell — for Applicant.

S. N. Banerjee (Jr.) — for Respondent.

Order.—On 8th March 1943 a petition was presented before me by Mr. Barwell on behalf of one Clarice Grace Raha described therein as a single woman and a medical practitioner residing at No. 32/13A, Beadon Street in the town of Calcutta within the jurisdiction of this Court. By the petition the applicant prays for an order appointing her the guardian of the persons of two minors Lovejoy Patell and Saleem Patell, alternatively for an order giving her the custody of them till they shall respectively attain the age of 21 years and for certain other incidental reliefs. On Mr. Barwell's application made at the time of the presentation of this petition, I granted an ad interim injunction in terms of prayer (6) of the petition restraining Yacoob Patell and Zainab Patell the father and mother respectively of the minors from removing the minors from their present residence at No. 11/1, Circus Avenue, Calcutta and fixed 15th March 1943 for the hearing of the application and directed notice of the application to be given to the parents and also to the three relations of the minors named in para. 6 of the petition.

A notice has accordingly been issued by the Registrar and has been served on those persons. In the notice, however, the first prayer is for the appointment of the applicant as guardian of the persons of the minors. There is no alternative prayer for her appointment as keeper or custodian of the minors as in prayer (1) of the petition. There was subsequently an application for committal for alleged breach of the interim injunction. The alleged contemnors having explained the alleged breach and having undertaken to obey the interim order I made no order on that application. Yacoob Patell, the father and Zainab Patell, the mother of the minors have filed a joint warrant of attorney and have appeared by learned counsel and are opposing this application. Three affidavits in opposition were filed, two of them being affirmed by the father and mother respectively and the third being a joint affidavit affirmed by Yusoof Patell and Hashim Patell the paternal uncle and the paternal uncle's son of the minors. They, however, have not formally appeared on this application. An affidavit in reply was filed by the applicant herself, after taking an extension of time for filing the same.

The application came up for hearing before me on 16th March last and was partly opened by Mr. Barwell. On the next day, Mr. Banerjee learned counsel for the respondents stated that his clients had a very short time to prepare their affidavits in opposition and could not consequently place all the facts before the Court and further that the affidavit in reply

contained new matters which his clients had no opportunity to deal with and asked for leave to file a further affidavit in opposition, which, he said, was ready. On a matter relating to minors, I did not consider it right to shut out any evidence and I gave leave to Mr. Banerjee's clients to file a further affidavit and also gave leave to Mr. Barwell's client to file a reply thereto if necessary. Accordingly, Mr. Banerjee has filed a further affidavit affirmed by Zainab Patell the mother of the minors and Mr. Barwell has filed a further reply affirmed by his client the applicant.

The matter has been argued before me with zeal, ability and thoroughness and I acknowledge my indebtedness to learned counsel on both sides for the very great assistance I have received from them. This matter, I confess, has caused a good deal of anxiety in my mind. While the argument was going on from day to day I took the opportunity of seeing and speaking to the minors separately in my chamber with a view to ascertain their respective wishes in the matter. I shall refer to my impressions in greater detail hereafter.

Mr. Banerjee has taken an objection as to the jurisdiction of this Court in entertaining this application. This objection is based on the fact that at the date of the presentation of the petition the minors were residing at premises No. 11/1, Circus Avenue, Calcutta, which is situate outside the ordinary original civil jurisdiction of this Court. Mr. Banerjee relied on the case in 21 Cal. 206¹ where Sale J. refused to appoint a guardian of the person and property of an infant who was not a European British subject and who was living outside the limits of the ordinary original civil jurisdiction of this Court. Mr. Banerjee referred me to the judgment of Sale J. at p. 211 of the report where his Lordship observed that even if the Court were to act under the powers conferred by the Charter, still, in exercising those powers, it would not disregard, but as far as possible follow, the principles and procedure laid down in the Guardians and Wards Act. Mr. Banerjee pointed out that in the Guardians and Wards Act the expression "District Court" includes "High Court." Mr. Barwell contended that under s. 9, Guardians and Wards Act, the application for appointment of guardian of the person is required to be made to the District Court having jurisdiction in the place where the minor ordinarily resides. He emphasised the words "ordinarily resides" and contended that it is the ordinary place of residence of the minor which determines juris-

1. ('94) 21 Cal. 206, In the matter of Srish Chander Singh.

diction of the particular Court and that such jurisdiction cannot be taken away by temporary residence elsewhere at the date of the presentation of the petition. He cited the case in A. I. R. 1940 ALL. 329² in support of his contention.

Leaving aside for the moment all matters of controversy as to the person with whom the minors lived, there is no doubt that from 1938 to February 1942 the minors ordinarily resided and attended schools in the town of Calcutta within the jurisdiction of this Court. Then they were sent to Darjeeling for education. They lived there upto November 1942 when on account of the annual vacation they came down to the applicant's place of residence in Beadon Street which is within the jurisdiction of this Court. There they lived admittedly up to January 1943. I need not, at this stage, discuss what happened subsequently. These facts, to my mind, are sufficient to indicate that the minors ordinarily resided within the ordinary original civil jurisdiction of this Court and the case cited by Mr. Barwell is in point and I agree with the decision in that case.

Further, S. 3, Guardians and Wards Act, expressly preserves the power of the High Courts, established under the statute 24 and 25 Vic., Chap. 104. Section 9 of that statute which established the High Courts provided that each of the High Courts should have and exercise all such civil, criminal, admiralty and vice-admiralty, testamentary, intestate and matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the Presidency for which it is established, as Her Majesty, by such Letters Patent as aforesaid, grant and direct. It will appear from the Letters Patent of 1865 that different jurisdictions are conferred on the High Court by different clauses. In some of the clauses the jurisdiction is limited to a particular territory while in others it is extended beyond those limits. Thus ordinary original civil jurisdiction is conferred on the High Court by Cls. 11 and 12, Letters Patent, but this is limited within a certain territorial limit. But the jurisdiction in testamentary matters which is conferred on it by Cl. 34, Letters Patent, is not limited to the territory to which the exercise of ordinary original civil jurisdiction is limited. There is no reason to hold that Cl. 34, Letters Patent, is controlled by Cl. 11. Likewise, Cl. 17, Letters Patent, confers on the High Court such power and authority with respect to the persons and estates of infants, idiots and lunatics within

2. ('40) 27 A. I. R. 1940 All 329 : I. L. R. (1940) All. 269, *Mt. Lalita Twaif v. Paramatma Prosad.*

the Bengal Division of the Presidency of Fort-William as that which was vested in the said High Court immediately before the publication of these presents. It will be noticed that this clause does not in terms limit this jurisdiction to any particular part of the Presidency, as does Cl. 11 with regard to ordinary original civil jurisdiction. This jurisdiction over infants is operative and is to be exercised on the person and estate of all infants within the Bengal Division of the Presidency. The power and authority, however, are the same as those which were vested in the High Court immediately before the publication of these Letters Patent. This takes us back to the Letters Patent of 1862 which prescribed the jurisdiction of the High Courts immediately before the publication of the Letters Patent of 1865. Clause 16, Letters Patent of 1862 ordained that the High Court shall have the like jurisdiction as to infants and lunatics as that now vested in the Supreme Court. The Supreme Court was established in Fort William in Bengal in 1774 by Charter issued pursuant to the authority conferred by S. 13, Regulating Act, 1773, (Stat. 13 Geo. III, Cap. 63). Clause 25 of this Charter of 1774 authorised and empowered the Supreme Court to appoint guardians and keepers for infants and their estates, according to the order and course observed in that part of Great Britain called England. It will be noticed that in Cl. 25 of the Charter of 1774 no territorial limit was prescribed for the exercise of this jurisdiction. It was for these reasons that Lord-Williams J. in 57 Cal. 533³ held that this Court had jurisdiction to appoint a guardian of the person and estate of an infant residing outside the ordinary original civil jurisdiction of this Court.

The case in 21 Cal. 206¹ was concerned mainly with the question of appointment of guardian of the estate of a minor. There were testamentary guardians of the infant in that case. The terms of the Letters Patent were not construed and Sale J. declined to exercise jurisdiction under the Letters Patent mainly on the ground that there was no precedent for such exercise of jurisdiction.

The question of construction of Clause 17, Letters Patent of 1865 again came up before this Court in a lunacy case reported under the heading: *In the matter of Phanindra Chandra*, 58 Cal. 919.⁴ Panckridge J. after referring to the terms of Cl. 17, Letters Patent of 1865, Cl. 16, Letters Patent of 1862 and Cl. 25 of the Charter of 1774 finally referred to S. 14, Regulating Act, 1773 (13 Geo. III, Cap. 63). The section provided that the new Charter

3. ('30) 17 A.I.R. 1930 Cal. 598 : 57 Cal. 533, *In re Taruchandra Ghose.*

4. ('32) 19 A.I.R. 1932 Cal. 91 : 58 Cal. 919.

which His Majesty was empowered to grant and the jurisdiction, powers and authorities to be thereby established should and might extend to all British subjects who shall reside in the kingdom or the Provinces of Bengal, Bihar and Orissa or any of them. Panckridge J. was of opinion that S. 14, Regulating Act, 1773, had the effect of confining the jurisdiction conferred on the Supreme Court by cl. 25 of the Charter of 1774, beyond the limits of Calcutta, to "British subjects" only which expression at that time meant a subject of the King of British birth. Accordingly Panckridge J. held that the original side of the Calcutta High Court had no jurisdiction to direct an inquisition or appoint a guardian of a person alleged to be a lunatic, if such a person was not a resident of Calcutta. This reasoning, with all respect to the learned Judge, does not appear to me to conclude the matter. Assuming that in the early statutes relating to India including the Regulating Act of 1773 the expression "British subject" meant a subject of the King of British birth, it does not follow that in 1862 the expression "British subject" continued to be confined to a subject of the King of British birth. Indeed after the assumption of direct control by the Crown under statutes, 21 and 22 Vict., Cap. 106 every native of British India became ipso facto a "British subject" and from that time onwards nothing could hinder the Supreme Court from exercising jurisdiction over native Indian infants in the moffusil of the presidency. The meaning of the expression "British subject" being thus enlarged the jurisdiction of the Supreme Court, since 1858, must be taken to have been enlarged so as to bring within its ambit all native Indian infants in the moffusil, who prior to 1858 may not have come within the meaning of that expression. The important question really is whether a particular person at the material time is a British subject or not. The matter will be found discussed at great length in the very learned judgments delivered by a Bench of the Madras High Court in I.L.R. (1937) Mad. 383.⁵

The same question was also considered by a Special Bench of the Bombay High Court in I. L. R. (1942) Bom. 39⁶ where it has been held that the jurisdiction vested in the High Court of Bombay under cl. 17, Letters Patent of 1865, is jurisdiction to exercise the power derived from the prerogative of the Crown as *parens patriæ* to protect those who cannot protect themselves, that it is not restricted to such persons and estates within the town and

island of Bombay and that outside that area, but within the Province of Bombay, it also extends to persons under such disability provided they are the subjects of the British Crown. I respectfully agree with the reasons given in the Madras case and the Bombay case to which I have just referred. The aspect of the matter discussed in those two cases was not apparently adverted to by Panckridge J. With great respect to Sale and Panckridge JJ. I prefer to follow the decision of Lord Williams J. in 57 Cal. 553³ and the decisions of the Madras High Court and the Bombay High Court in the two cases I have just mentioned. Even if it be accepted that the power of this High Court was formerly limited only to a part of the Presidency, I would be prepared to hold, following the opinion of the learned Chief Justice of Bombay in the Special Bench case in I.L.R. (1942) Bom. 39⁶ that cl. 17, Letters Patent of 1865, read with cl. 16, Letters Patent of 1862, by conferring on this Court power and authority with respect to the persons and estates of infants, idiots and lunatics within the Bengal Division of the Presidency of Fort-William conferred upon the High Court a jurisdiction more extensive, in the territorial sense, than that which the Supreme Court had possessed.

The result is that, in my opinion, this Court has jurisdiction, both under S. 9, Guardians and Wards Act, and under cl. 17, Letters Patent of 1865, to entertain the present application and that in exercise of the jurisdiction under cl. 17, Letters Patent of 1865, this Court should follow the principles adopted by the Court of Chancery in England and that this jurisdiction of the High Courts has been expressly preserved by S. 3, Guardians and Wards Act of 1890. This does not, however, mean that I should ignore the principles embodied in the last mentioned Act. To my mind, the provisions of that Act in effect adopt the cardinal principles upon which the Court of Chancery in England used to act. Where the Act is silent or the provisions thereof are contrary to or inconsistent with the principles of the Court of Chancery, this Court in appropriate cases will act on the principles on which the Court of Chancery in England would act in similar circumstances.

It is common ground that neither of the minors has any property. Both the father and the mother of the minors are alive and are opposing this application. They are Mahomedan by religion. They are British subjects. According to the indigenous Mussalman law the mother is entitled to the custody of her male child until he has completed the age of seven years and of her female child until she has attained puberty. Failing the mother, the

5. (37) 24 A.I.R. 1937 Mad. 51 : I.L.R. (1937) Mad. 383, *Raja of Vizianagaram v. Secy. of State*.

6. (41) 28 A. I. R. 1941 Bom. 397 : I. L. R. (1942) Bom. 39 (S.B.), *In re Ratanji Ramji*.

custody of a boy under the age of seven years and of a girl who has not attained puberty belongs to certain female relations in preference to the father. The father is entitled to the custody of a boy over seven years and of an unmarried girl who has attained puberty.

It should be remembered, however, that according to the Mussalman law the minority of a male or female terminates when he or she attains puberty. Puberty and majority, in the Mussalman law, are one and the same: *see* Hed. 529 (Book 35, Chap. II) Translator's foot-note. Among the Hanafis and the Shias puberty is presumed on the completion of the 15th year. In default of evidence as to puberty a minor of either sex is considered adult on the completion of his or her 15th year. Under the Mussalman law any person who has attained puberty is entitled to act in all matters affecting his or her status or his or her property. This indigenous Mussalman law has been materially altered by the Indian Majority Act and the only matters in which a Mahomedan is now entitled to act on attainment of puberty are, (1) marriage; (2) dower; and (3) divorce. In all other matters his minority continues until the completion of 18 years.

In the case now before me both the minors have completed the age of 14 years. The female minor has admittedly attained puberty. Therefore according to Mussalman law the female minor has attained majority. Though under the Indian Majority Act she is still a minor, her capacity to act in the matter of marriage, dower and divorce is not affected by anything contained in that Act: *see* S. 2, Indian Majority Act. From what I have stated above it is clear that under the Mussalman law the mother of the two minors cannot claim the custody of either of the two minor children. Indeed in the affidavits in opposition no claim has been put forward on behalf of the mother. In fact the mother has sworn two affidavits, which have been filed herein, in which, while repudiating the necessity for the appointment of any guardian at all, she insists on her husband, the father of the minors, being appointed their guardian if this Court is minded to appoint any guardian of the persons of the minors. In this application, however, I shall consider the claim of the father and the mother according to the principles laid down in the Guardians and Wards Act and according to the principles on which the Court of Chancery in England would consider such claim.

According to the law of England, the father has the control over the person, education and conduct of his children until they are 21 years of age. If a child is taken away from the father or if a child leaves the father the

father has the right to come to Court and ask for return of the child to him. The question mainly arose in cases where the father sued out a writ of habeas corpus. At Common law the right of the father and of the mother, as guardian for nurture, after the death of the father, there being no testamentary guardian, was treated as paramount and could be enforced by writ of habeas corpus. In those cases if the child was a male child above 14 years or if the child was a female child above 16 years the Court would consult their wishes and if the Court was satisfied that such a child desired to be where it was, then the Court would not make any order in favour of the parent; because in those circumstances the very ground of an application for a habeas corpus, namely, that the child was in illegal custody without his consent, did not subsist. If, however, the child was below the age, viz., below 14 years in the case of a male child and below 16 years in the case of a female child, the Common Law Court had no jurisdiction to refuse the prayer of the parent, unless cruelty or contamination from gross immorality of the parent or guardian was to be apprehended. The principle on which the Common Law Court acted was that the parents, as against other persons, generally had an absolute right to the custody of the children unless he or she had forfeited it by some gross misconduct. This absolute right of the parents was recognized because such a right was necessary for preserving the natural order and course of the family life which is the foundation of society and the Court of Common Law did not interfere with parents except upon grave occasions or for reasons of urgency. The law recognized the natural rights of the parents because it recognized the natural duties of the parents. It is the natural affection of the parents for the child which is the security for the performance of the duties towards the child and the performance of the duties alone qualifies the parents to claim the absolute right. It is the natural affection which makes them the natural guardians. The rights of the parents are sacred rights and their duties are also sacred duties. Cruelty and gross immorality render the parents unfit to perform the sacred duties and therefore on proof of such misconduct they cannot be allowed to claim the sacred rights. Parents guilty of gross misconduct become unnatural parents and cease to be natural guardians and when they cease to be natural guardians they cannot legitimately claim the rights of a natural guardian. This is the principle on which, I apprehend, the Court of Common law in England acted.

There was, however, another jurisdiction which has been exercised by the Court of

Chancery from time immemorial. It was what has been called the paternal jurisdiction derived from the prerogative of the Crown as *parens patriæ*. Lord Cottenham L. C., observed in the case in (1847) 2 Ph. 247⁷ as follows:

"I have no doubt about the jurisdiction. The cases in which this Court interferes on behalf of infants are not confined to those in which there is property. Courts of law interfere by habeas for the protection of the person of anybody who is suggested to be improperly detained. This Court interferes for the protection of infants, qua infants, by virtue of the prerogative which belongs to the Crown as *parens patriæ*, and the exercise of which is delegated to the great seal."

Lindlay L. J. observed in (1893) 1 Ch. 143:⁸

"The duty of the Court is, in our judgment, to leave the child alone unless the Court is satisfied that it is for the welfare of the child that some other course should be taken. The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of the child is not to be measured by money only nor by physical comfort only. The word 'welfare' must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded."

Attempt has been made in arguments in various cases to induce the Court of Chancery to hold that in the exercise of this jurisdiction the Court of Chancery was bound to give the custody of the child to the parents unless the parents had been guilty of misconduct to the extent which would in a Common Law Court have destroyed the prima facie absolute right of the parents but such attempt has at all times been resisted by the Court of Chancery. The Court of Chancery has never disregarded the ties of affection or the prima facie right of the parents over the person, education and conduct of child. The Court of Chancery has recognized that generally speaking the best place for a child is with its parents. The Court of Chancery has never said merely because the parents are poor and the person who seeks to have the custody of the child as against the parents is rich, that without regard to the natural rights and feelings of the parents the child ought to be taken away from its parents merely because its pecuniary position will be thereby bettered. On the other hand when the welfare of the child has demanded it the Court of Chancery has never hesitated to exercise its jurisdiction nor has it consented to limit its jurisdiction to interfere with the parental rights only to gross misconduct of the kind such as the Common Law Court would consider sufficient to destroy the prima facie rights of the parents. Accordingly the Court of Chancery even on applications by the parents by habeas corpus has interfered and deprived the parents of the custody of the child when it has been satisfied that it is clearly right for

the welfare of the child in some very serious and important respects that parents' rights should be suspended or superseded although the parents have not been guilty of any misconduct which alone would disentitle them to the custody of the child in Common law. The case in (1893) 2 Q. B. 232⁹ is a typical example of the exercise of this paternal jurisdiction. The grounds on which the Court of Chancery has interfered with the parents' rights are, classified in Part 11, Chap. 7, S. 5 pages 106-112 of Simpson on the Law of Infants, End. 4 under five heads, viz., (1) unfitness in character and conduct, e. g., that the parents have been guilty of cruelty or immorality; (2) unfitness in external circumstances, e. g., poverty combined with other reasons; (3) waiver of their rights, e. g., allowing the child to be brought up in a higher social position; (4) agreement between husband and wife on marriage or on separation or agreement by father with a third party where the agreement has been acted upon, so that a revocation of it would injuriously affect the child; and (5) where the father is or intends to go out of the jurisdiction. These principles have been recognized and acted upon by Courts in this country. Thus Sale J. in 23 Cal. 290¹⁰ at page 298 observed that

"the Court will not allow parents, who have abandoned the custody of their child to third persons, to attempt capriciously to re-assert their rights, without showing that the welfare of the child warrants and requires such action on their part."

The same principle is recognized by the Judicial Committee in the well-known case in 41 I. A. 314¹¹ and the following passage at page 320 is in point:

"There is no difference in this respect between English and Hindu law. As in this country so among the Hindus, the father is the natural guardian of his children during their minorities, but this guardianship is in the nature of a sacred trust, and he cannot therefore during his lifetime substitute another person to be guardian in his place. He may, it is true, in the exercise of his discretion as guardian, entrust the custody and education of his children to another, but the authority he thus confers is essentially a revocable authority, and if the welfare of his children require it, he can, notwithstanding any contract to the contrary take such custody and education once more into his own hands. If, however, the authority has been acted upon in such a way as, in the opinion of the Court exercising the jurisdiction of the Crown over infants, to create associations or give rise to expectations on the part of the infants which it would be undesirable in their interests to disturb or disappoint, such Court will interfere to prevent its revocation: (1821) Jacob 245.¹²"

The case reported in 68 M. L. J. 213¹³ proceeds

9. (1893) 2 Q. B. 232, *The Queen v. Gyngall*.

10. ('96) 23 Cal. 290, *In the matter of Joshy Assam*.

11. ('14) 1 A.I.R. 1914 P. C. 41 : 38 Mad. 807 : 41 I. A. 314 (P.C.), *Annie Besant v. Narayaniah*.

12. (1821) Jacob 245, *Lyons v. Blenkin*.

13. ('35) 22 A. I. R. 1935 Mad. 363 : 68 M. L. J. 213, *Ponniah Asari v. Subbiah Asari*.

7. (1847) 2 Ph. 247, *In re Spence*.

8. (1893) 1 Ch. 143, *In re McGrath*.

on the same principle. It is not necessary nor profitable to multiply instances. The same principle, to my mind, is laid down and/or implicit in ss. 17 and 19, Guardians and Wards Act. Keeping the above principles in view, I now turn to the facts of this case. Yacoob Patell, the father of the minors comes of a Muslim family of Surat. Zainab Patell, the mother of the minors is a Jewess by birth. It is stated that she embraced Islam when she was three years old. It does not appear where she was born or brought up. Yacoob Patell married Zainab Patell in or about 1910 when she was a girl of 12 years of age. It does not appear from the affidavits where they were married. Yacoob Patell carried on business with his brothers in Rangoon as hardware merchant. The business was started some time in 1916. In 1928 they came to know the applicant in Rangoon where the latter was practising as a Medical Practitioner. The applicant was then married to a Jewish gentleman of the name of Mr. Elias Solomon, who was a Professor in the University College in Rangoon. On 3rd March 1929 Zainab Patell gave birth to twins, a boy and a girl, being the two minors now before me. The applicant was the medical attendant of the said Zainab Patell prior to, at and after the birth of the twins. It is common ground that the applicant and her husband were on very friendly social terms with the parents of the minors and from papers now before me it is quite evident that this friendly social intercourse continued for over 14 years right up to February 1943. The relationship between the two families may well be described in the language of Yacoob Patell himself which is as follows:

"After that we became very friendly with the petitioner and her husband Mr. Solomon who was a Professor in the University College of Rangoon. My wife became so friendly with the petitioner that they used to look upon each other as sisters and my wife used to visit the petitioner at her house in Rangoon in the same way the petitioner also used to visit my wife at our place. In fact friendship was so great that we thought the petitioner and her husband as our own people just as the petitioner and her husband thought us to belong to them."

This relationship, to my mind, serves as the real background against which one may have a vivid perspective of the events that followed the birth of the twins. I propose now to deal with this application in so far as it concerns the male child Saleem Patell. It is common ground that after the birth of the twins the male child remained with the parents until about November 1937 or middle of 1938 when the applicant agreed to take over the custody and care of the boy and to educate the boy. It appears that the boy was admitted to St. Mark's School and from there transferred to St. Xavier's College, Calcutta in January 1939.

From the form of application for admission which is annexed to the affidavit in reply, it appears that the boy was admitted into the school under the name of Saleem Solomon, his religion was declared as Muslim and the nationality of his parents was stated to be Indian. The applicant was described as his guardian. The applicant states that she maintained and educated the boy from the end of 1937 up to January 1939 entirely at her own expense. The applicant, however, admits that from January 1939 up to October 1941 Yacoob Patell paid to the applicant Rs. 150 per month for about two months and thereafter Rs. 100 per month upto October 1941.

Yacoob Patell and Zainab Patell in their affidavits have stated that in 1938 there was a serious riot in Rangoon and the boy with his mother came over to Calcutta and thereafter he was put into a school in Calcutta and the father bore all the educational expenses. It is said that from January 1939 upto October 1941 the sum of Rs. 3500 had been paid by the father and Rs. 500 by Mr. Hassim Patell on behalf of the father and that between November 1941 to January 1942 Zainab Patell herself paid Rs. 500. Yacoob Patell also stated that when the boy was sent to Darjeeling in 1942 he paid for his maintenance and education expenses for May, June and July 1942. It is admitted by him that since July 1942 he has not been able to make any further payment owing to financial difficulties brought about by the present emergent state of affairs. It is very difficult for me, on the affidavits to ascertain precisely the amounts paid by the father for the maintenance and education of the boy. It is, however, clear to my mind that the father considered it to be his duty to pay for the maintenance and education of the boy and recognised that he was responsible therefor. In the case of this boy I do not feel that the father has failed or neglected to discharge his natural duties towards the boy to such an extent as would disqualify him from asserting his natural rights as the father of the child. In other words, I do not find in the case of the boy any abdication of the rights of the father and this being so, the question of capricious re-assertion of the parental right does not arise. On the evidence before me, I cannot say that the father ever intended to relinquish his rights over his only boy. Mr. Barwell has strongly relied on the fact that the boy was admitted into the school under the name of Solomon, the fact that there is no evidence of what he called "contact" between the parent and the boy or of interest taken by the father in the education and upbringing of the boy. He insists on these facts as evidence of abandonment of the parental rights. While I agree

with Mr. Barwell that Yacoob Patell has not perhaps acted towards the boy as an ideal father would do towards his boy I cannot go any further with him. I cannot overlook the fact that the boy was maintained and brought up by the father for the first 8 years of his life, that the father was busy with his business which kept him at Rangoon, that he had to send his wife and the child over to Calcutta on account of the exigencies of the situation brought about by riots in Rangoon, that the mother has been in Calcutta and above all that the father has to the best of his ability been defraying the expenses of the maintenance and education of the boy in Calcutta. In these circumstances I cannot say that in my opinion the father is unfit to be guardian of the person of the boy either within the meaning of s. 19, Guardians and Wards Act, or according to the principles on which the Court of Chancery in England would interfere with the rights of the father.

I have taken the opportunity to see and speak to the boy who is just over 14 years of age with a view to ascertain his wishes in the matter. It appeared to me that while the boy was quite affectionate towards the applicant as his letters to the applicant clearly indicate, he had similar affection for his parents. He said that he preferred to remain with them. It may be that recent close association even for the short period of a month has revived the affection he had imbibed for his parents during the first 8 years of his life. It may also be, as I gathered from one or two remarks let fall by him, that this revival of affection was helped and accelerated by a promise of the parents to keep him on in the same school at Darjeeling or to put him in an equally good school in Bombay, but the general impression I got was that the boy preferred to remain with his parents. At one time I thought that it would be right for me to insist on an undertaking from the parents as to the mode of his education and general upbringing, but after hearing Mr. Banerjee I have come to the conclusion that, as I do not consider the father to be an unnatural or unfit father, it would not be right for me to impose any restriction on the discretion of the father in matters of education and conduct of the boy. The result is that I do not feel called upon or entitled to make any order with regard to the boy and I make no order on this application in so far as it concerns the boy, Saleem Patell.

I now come to deal with this application in so far as the female minor is concerned. The applicant's case is that prior to the birth of the minors the applicant's diagnosis was that Zainab Patell would in due course give birth to twins and the said Zainab Patell and her

husband Yacoob Patell then and there promised that if twins were in fact born to them, then and in that case, one of the twins would be given to the applicant to rear up and care for as her own child and that the parents would thereafter make no claim to the guardianship or custody of the child so given to the applicant. This alleged promise is denied by both the parents in their respective affidavits. It seems to me that a promise of this description by itself has no legal effect as an agreement, for no Court of Chancery would specifically enforce such agreement and thereby compel the parents to abdicate their sacred duties and rights as such parents. The parents can at any time before such a promise has been acted upon revoke and repudiate such promise. Such a promise, to my mind, is of importance only as a matter of inducement, a starting point, to explain the subsequent events and the conduct of the parties which I shall therefore have to examine. If the subsequent events amount to a renunciation of the parental rights such renunciation must be referable to some agreement express or implied. For the purpose of this application it will make no difference whether such renunciation had its origin in this promise alleged by the applicant or to any subsequent promise express or implied. This alleged promise, therefore, has some value as a stage in the history of this case and as a fact explaining subsequent events and I attach no other value to it. I need mention, however, that I see no inherent improbability in the story of the applicant. It will be remembered that the mother of the minors was a Jewess by birth. The applicant had married a Jewish gentleman. The two families were on very friendly social terms. The mother of the minors was in delicate health and one may easily understand that she would find it difficult to rear up two children at the same time. The applicant was the medical attendant of the mother. She and her husband were in fairly affluent circumstances and without any child and consequently it may well be that the parents of the twins would give one of them, particularly the female child, to the applicant to be reared up and cared for. In the circumstances it is only natural that the parents would retain the male child and make over the female child to the applicant. The question of importance is whether such making over was a temporary measure or intended to be a permanent arrangement so far as the female child is concerned. The subsequent events will show the real intention of the parties.

The applicant's case is that pursuant to the

said promise when Zainab Patell gave birth to twins in one and the same accouchement, the parents gave to the applicant the custody and care of the female child and for the next 14 years, save for a period of five months in 1938 the said female child has lived and remained with the applicant who has brought her up with the utmost care and affection, has maintained her entirely at her own charges and has educated her as if the female child were the applicant's own child. The female child used all along to call the applicant "Mummy" and the applicant's husband "Daddy." When the child grew up the applicant put her into the Convent School in Rangoon. In 1932 the applicant took her to Kashmere for a change of air. In December 1933 the child had an attack of Broncho-pneumonia and the applicant took her to Switzerland for her convalescence in the beginning of 1934. After returning from Europe, the applicant returned to Rangoon with the child and shortly thereafter left Rangoon and came to Calcutta. In December 1936 she took the child on a motor tour to Agra. In April 1937 she again proceeded to England with the child and returned to India towards the end of 1937. The child and the applicant went to Delhi and the child was put into a school at Delhi, where she stayed until about March 1938. From March 1938 up to the beginning of September 1938 the child lived with the mother partly in Calcutta and partly in Rangoon. During this period, the applicant met with a serious motor accident and also became seriously ill. In September 1938 the child came back to the applicant and since then stayed with her. In October 1938 the applicant had the girl admitted into Loretto School, Calcutta under the name of Lovejoy Solomon. That the applicant bore all the educational expenses of the child will appear from the receipts and certificates granted by the school authorities. In February and March 1941 the female child travelled with the applicant to Bhopal, Gwalior, Indore, Ajmer and other places. Apart from the education in school, the female child was given lessons in music by a music teacher at the applicant's place of residence at different places in Calcutta as will appear from the music teacher's letter set out in para. 6 of the applicant's affidavit affirmed on 26th March 1943. In February 1942 the female child was sent to the Loretto Convent, Darjeeling, when there was a general exodus from this town. The applicant also took a small flat at Darjeeling so that she can reach her whenever it becomes necessary. That she paid the school fees and other expenses at Darjeeling will appear from the receipts of the school

authorities which have been annexed to her affidavit affirmed on 15th March 1943. In November 1942 the school closed for the annual vacation and the female child came down to Calcutta and lived with the applicant at her Beadon Street residence until February 1943. Such is the time table showing the movement of the female child for 14 years as given by the applicant in her two affidavits affirmed on 15th and 20th March 1943, respectively.

In the first affidavit in opposition of the father Yacoob Patell affirmed on 13th March 1943 the father has also set out a time table showing the movement of the female child. This time table is indeed scrappy and many of the important events in the life of this female child do not find a place therein, a fact which, to my mind, indicates want of knowledge due perhaps to want of interest in the child. It is only when the applicant set out a detailed time table in her first affidavit in reply that a second affidavit in opposition was put in practically adopting the same and explaining the residence and movements of the child with the applicant as being under express consent given on each occasion. It is neither profitable nor necessary to go into details. Suffice it to say that on a perusal of the different affidavits I have definitely come to the conclusion that the story of the applicant is generally correct and true. It is also clear to me that the applicant has respected the sentiments of the mother by allowing the mother to stay with her and also by allowing the child occasionally to stay with the mother. I find it difficult to believe the story of express permission said to have been given by the parents to the applicant each time the latter took the child with her to any place. I have no doubt that this story has been put forward, if possible, to establish the retention of parental rights over the female child.

Apart from a bare statement there is no tangible evidence that the parents ever paid a single pie towards the maintenance and education of the female child. The only evidence of payment is of the aggregate sum of Rs. 3500 to Rs. 4000 between January 1939 and October 1941. I accept the statement of the applicant that these payments were made specifically towards the cost of maintenance and education of the male child. If the parents made any payment to the school authorities in Delhi, Calcutta or Darjeeling on account of the female child it should have been easy for them to produce the receipts or even duplicates thereof or even a certificate from the school authorities but none is forthcoming. I have no hesitation in holding that the

female child has all along been maintained and educated by the applicant at her own cost.

There is no tangible evidence before me that the parents or either of them took any interest whatever in the female child in the matter of her education, secular or religious or in her general up-bringing. They were never in touch with the school authorities and never called for any progress report. There is no evidence that they ever made any present of clothes, books, toys or trinkets to the girl. There are letters written by the female child to the applicant in which the applicant is addressed as "Mamy Darling" whereas her own mother is referred to by her name. There is a letter from the mother to the female child in which she blessed the applicant for all that she had been doing for the child. There is another letter from the maternal-grandmother in the same strain expressing gratitude towards the applicant. The child's letters show that she is taking a keen interest in her study, forming new friendships and that she is perfectly happy in her new environment where she has been receiving proper education.

There is no allegation in any of the affidavits in opposition that there has been any attempt at proselytising. There is no suggestion in the affidavits that the education which the girl is receiving is not suitable to her or is in any way opposed to the tenets of Islam. It is not suggested that the family to which the parents belong is an orthodox Mahomedan family. On the contrary I find that two of the small boys of this family are nicknamed Tinker and Bunny and are being educated in a European school at Darjeeling. The letter of the mother and the cousin Hassim written on 7th April 1942, and the letter of Hassim to the female child dated 16th October 1942, and the letter of Hassim to the applicant show that they are perfectly well satisfied with the education that was being imparted to the female child.

On the evidence before me I am satisfied that the parents voluntarily made over the female child to the applicant not as a temporary measure, but with a view to make a permanent arrangement for her future life and this long-continued acquiescence has given rise to associations and expectations in the mind of the female child that she would be continued to be brought up in the way she has been brought up so far and it will be unkind now to abruptly disappoint or frustrate this expectation. I have no doubt in my mind that the parents in doing what they have done, were actuated by the best of motives towards the child. But by this long acquiescence and through no other fault or misconduct of their own, they have placed themselves in such a

position with regard to this female child that they have forfeited their natural rights and in my opinion have rendered themselves unfit to be the guardians of this female child. The sudden change of mind appears to me to be a capricious reassertion of their parental rights which they have voluntarily relinquished. It does not appear to me that the welfare of the child requires that they should be permitted at this stage to re-assert their original sacred rights. Admittedly the father is now in financial difficulties. In his affidavit he has given me no indication of his means. He has not shown what programme he wants to follow in the matter of the education and up-bringing of the child. Mr. Banerjee has referred me to the case in (1883) 24 Ch. D. 317¹⁴ and (1926) 1 Ch. D. 676.¹⁵ Both the cases are distinguishable on facts, as in neither of them was there any failure on the part of the father to maintain the child and the question of abandonment of parental rights was not in issue. Even in (1883) 24 Ch. D. 317¹⁴ it was recognised that the father may lose his rights by conduct amounting to abdication of paternal authority. Mr. Banerjee referred me to the report of *Besant's case* in 38 Mad. 807¹¹ at p. 810 where the letter of the father is set out and relied on the observations of their Lordships of the Judicial Committee at page 822 to the effect that "no order declaring a guardian could by reason of S. 19, Guardians and Wards Act, 1890, be made during the respondent's life unless in the opinion of the Court he was unfit to be their guardian, which was clearly not the case."

Relying on this passage Mr. Banerjee argued that a contract relinquishing the parental rights even if acted upon did not make the father unfit to be the guardian of the person of his child. Mr. Banerjee overlooked the fact that the letter written by the father in *Besant's case*¹¹ did contain several reservations of parental rights on several eventualities, whereas in the case now before me, I find no reservation contained in any letter or even in the present affidavits. Further in 38 Mad. 807¹¹ the father re-asserted his rights after a short time, whereas in this case there has been a continued waiver for 14 years. Mr. Banerjee relied on para. 2 (vi) of the applicant's first affidavit in reply as evidence of assertion of parental rights. It is curious, however, that such an important fact found no place in the respondent's own affidavits in opposition. Further the facts alleged in that paragraph do not necessarily amount to assertion of right or admission of any right. It should also be remembered that another period of six years of acquiescence on the part of the parents has

14. (1883) 24 Ch. D. 317, *In re Agar-Ellis*.

15. (1926) 1 Ch. D. 676, *In re Thain; Thain v. Taylor*.

elapsed since the said alleged re-assertion of right by them.

Mr. Banerjee contended that in this case there was no question of raising any expectation in the mind of the child because the applicant has not settled any property on the child. Mr. Banerjee's argument is that the expectation referred to in the cases must be financial expectation. The cases however show, and the case, (1893) 2 Q. B. 232,⁹ is only an example that financial expectation is not necessarily the only expectation which the Court of Chancery has declined to frustrate or disappoint. It has not been alleged, far less proved, that the applicant has not done her duty towards the female child. She has brought her up from her infancy when she was weak and delicate and now she is a bright and sprightly child. The applicant is a person who has been properly meeting all the expenses of the child and is willing to continue to do so. In answer to one of my questions, her counsel readily agreed to furnish security for payment of proper maintenance and education of this child until she attains majority, in case any untoward event happens to the applicant in future by death or otherwise. This certainly relieved me of good deal of anxiety that I felt in the beginning as to what would happen to the child on a premature death of the applicant.

At one time Mr. Barwell stated that his client would be content if she were appointed only as the keeper or custodian of the child instead of being appointed as her full-fledged guardian. No case has been cited before me in which the Court of Chancery has, on the application of a stranger, appointed such stranger as mere keeper or custodian as against the parent. At one time I thought that under S. 25, Guardians and Wards Act, read with S. 4 (ii) I could make an order for return of the female child to the custody of the applicant. The matter is not free from doubt and there is a case where it has been held that a person who is not the natural guardian cannot come and ask for custody without being first appointed guardian: see A.I.R. 1925 Oudh 282.¹⁶ Further such a limited order will, I apprehend, give rise to complications which in the best interests of the child should be avoided.

In the facts and circumstances of this case I have come to the conclusion that the parents have relinquished their natural rights in regard to the female child and that by such conduct they have rendered themselves unfit to be a guardian of the person of the female child and there is no impediment in the way

16. ('25) 12 A. I. R. 1925 Oudh 282, *Mt. Chandra Kuar v. Chotey Lal*.

of my appointing a guardian of the person of the female child. I desire to make it clear that I do not find or hold that the parents have been guilty of any misconduct or moral delinquency such as at Common law would disentitle them from asserting their rights but I do find and hold that they have by their own conduct placed themselves in such a position that they cannot be permitted to re-assert their parental rights. I am not satisfied that it would be for the welfare of the child to revert back to her parents. I find no explanation for this sudden change of mind on the part of parents. Mr. Banerjee strenuously argued that the parents do not desire that their female child should become a Doctor of Philosophy or a Doctor of Medicine or a modern girl, but that she should be a good wife and a good mother. If that be the notion of the parents, they should not have allowed this child to receive such education for these five years. Nor do I see that the education that the girl is receiving will render her in any way unfit to be a good wife or a good mother. There is no suggestion whatever in the affidavits that this girl was becoming a "modern girl" in the sense in which that expression has been used by learned counsel. It is stated in the first affidavit in opposition that it is usual for the girls of this family to be married when they are between the ages of 16 and 20. I see no impediment in the way of her marriage within this age if she be so minded. I need only remind the parents that under the Mussalman law the girl having attained puberty has attained majority and is entitled to all according to her will in matters of marriage and dower. Section 2, Indian Majority Act, expressly reserves this capacity.

I have seen the female child and spoken to her although she is below the age of 16 years. I think I am right in doing so on good authority: see 48 Mad. 299¹⁷ and 68 M.L.J. 213.¹³ The girl is a bright and intelligent girl. I am satisfied that she will be happy if she is permitted to live with the applicant. The fact of her living with the parents for a month has in no way impaired her affection for the applicant which is disclosed in every one of her letters. I am indeed relieved to find that her wishes coincide with what, in the circumstances, I conceive to be the requirement of the law. She has no fancy for getting married at this early age and having regard to the opinion, she expressed before me against early marriage and to what I have stated about her capacity under the Mussalman law and even under the Indian Majority Act in matters of marriage, dower and divorce it would not

17. ('24) 11 A. I. R. 1924 Mad. 873 : 48 Mad. 299, *Saraswathi Ammal v. Dhanakoti Ammal*.

be right for me to do anything which may possibly expose her to undue pressure from her parents and thereby affect or impair her capacity to decide for herself the matter of her own marriage.

I desire to make it clear that I do not consider that the applicant has any independent right of her own. I am appointing her as the guardian of the person of the female child not because the applicant has any right to be so appointed or that I can take note of her sentiments but because the welfare of the female child demands it. The result is that I make the following order that upon the applicant undertaking to pay month by month and until the female child attains majority all the costs of maintenance and education of the female child in Loretto Convent, Darjeeling or any other school elsewhere of equal standing and upon her furnishing security in the shape of Government securities or otherwise to the satisfaction of the Registrar for such payment and upon her undertaking to give reasonable opportunities to the parents to see the female child I appoint the applicant as the guardian of the person of the female child Lovejoy Patell. I make no order as to costs of this application or of the contempt application.

G.N.

Order accordingly.

A. I. R. (31) 1944 Calcutta 445

B. K. MUKHERJEA AND AKRAM JJ.

*Haji Hafizuddin Ahmed on death
Fayezuddin Ahmed and others —
Plaintiffs — Appellants*

v.

*Natabar Chandra Saha—Defendant —
Respondent.*

Appeal No. 1436 of 1940, Decided on 30th June 1944, from appellate decree of Sub-Judge, Jessore, D/- 22nd May 1940.

(a) Bengal Public Demands Recovery Act (3 of 1913), S. 20 (3)—Applicability — Collector attaching estate under S. 99, Bengal Cess Act and appointing receiver — Sale in execution of rent certificate at instance of receiver—S. 20(3) does not apply.

In order to attract the operation of S. 20 (3) the rent certificate in execution of which the sale is held must have been obtained by the sole landlord or the entire body of landlords. [P 447 C 1]

An estate was attached by the Collector for arrears of cesses under the provisions of S. 99, Bengal Cess Act, and a receiver was appointed by the Collector, with powers to collect rents from different classes of tenants who held lands in that estate. There was a raiyati holding in the estate. On a certificate issued on the requisition of the receiver appointed by the Collector this holding was put up to sale and purchased by the plaintiff. The question was whether the holding itself vested in the purchaser under S. 20 (3) with power to annul all incumbrances in the manner specified in that section.

Held that neither the Collector nor the receiver appointed by him could be said to be the landlord with regard to the holding which was sold in execution of the certificate for rent and consequently the provisions of S. 20 (3) were not attracted to the case. [P 448 C 1]

(b) Bengal Cess Act (9 of 1880), S. 99—Collector exercising powers under—Position of.

The position of a Collector exercising powers under S. 99 is quite different from that of a usufructuary mortgagee of the landlord's interest, or a receiver appointed by Court or a person to whom possession of a property has been given under O. 39, R. 9, Civil P. C. As a result of the attachment, the Collector does not become the assignee of any interest in the estate or tenure as in the case of a usufructuary mortgagee nor is he put in possession of any particular estate or interest as in the case of a receiver appointed by Court or of a person who is given possession under O. 39, R. 9, Civil P. C. The property does not pass under the charge or management of the Collector by virtue of the attachment. He does not represent the proprietary interest or in fact any other kind of interest and all that he can do is to exercise the statutory powers of realising rents from any person who holds lands in any capacity within the estate or tenure, no matter to whomsoever the rent might be payable. The different classes of landlords or rent-receivers still retain their status and they can file suits for recovery of rents against tenants though no decree can be passed in their favour so long as the attachment subsists. [P 448 C 1]

Jitendra Nath Guha and C. F. Ali —

for Appellants.

Prafulla Kumar Das — for Respondent.

B. K. Mukherjea J.—The material facts giving rise to this appeal are not in controversy and may be shortly stated as follows: A revenue paying estate bearing touzi No. 138/3 of the Jessore Collectorate and belonging to one Suresh Chandra Deb Roy was attached by the Collector for arrears of cesses under the provisions of S. 99, Bengal Cess Act. The notification under that section was published on 27th and 28th January 1935 and the Manager, Naldanga Estate was appointed receiver by the Collector, with powers to collect rents from different classes of tenants who held lands in that touzi. There was a raiyati holding carrying an annual rental of Rs. 15-11-3p. recorded in R. S. Khatian 181 of Mouza Kapashati within touzi 138/3 in the name of one Baul Mandal. On a certificate issued on the requisition of the receiver appointed by the Collector as mentioned above, this holding was put up to sale on 30th September 1936 and purchased by the plaintiff Hazi Mafizaddin Ahmad. The plaintiff took symbolical possession on 9th March 1937, but when he went to take actual possession he was resisted by the defendant who claimed an under-raiyati interest under the certificate-debtor in respect of the lands in suit on the basis of a kabuliyat dated 9th June 1931. The plaintiff then served a notice upon the defendant under S. 167, Bengal Tenancy Act, with a view to annul the incumbrance which the

latter purported to hold, but as the defendant still refused to vacate the lands the present suit was instituted. The plaintiff's contention in substance was that the sale being for arrears of rent due in respect of the holding the holding itself vested in the purchaser under S. 20 (3), Public Demands Recovery Act, 1913, with power to annul all incumbrances in the manner specified in that section. As the under-raiyati interest alleged to be held by the defendant was annulled by proper notice under S. 167, Ben. Ten. Act, the latter had no further right to remain in possession of the land.

The suit was contested by the defendant who contended inter alia that the certificate in execution of which the property was sold having been obtained on the requisition of the Collectorate officer and not of the landlord of the holding, the provisions of S. 20 (3), Public Demands Recovery Act, were not attracted to the case and consequently the purchaser could only acquire the right, title and interest of the judgment-debtor. It was, therefore, argued that the plaintiff was not competent to evict the defendant on annulment of his under-raiyati interest which was a valid and subsisting interest at the date when the certificate was executed. The trial Court negatived the contention of the defendant and decreed the plaintiff's suit being of opinion that the plaintiff acquired the holding itself with powers to annul all incumbrances as laid down in S. 20 (3), Public Demands Recovery Act. On appeal the Subordinate Judge of Jessore reversed the decision of the trial Judge and dismissed the plaintiff's suit. The original plaintiff died since then and his heirs have now come up on second appeal to this Court.

Mr. Guha, appearing on behalf of the appellants, has put forward a two-fold contention in support of the appeal. His first contention is that the Court of appeal below was wrong in holding that to bring a case within the purview of S. 20 (3), Public Demands Recovery Act, it is necessary, that the certificate in execution of which the sale took place must be obtained on the requisition of or in favour of the landlord, meaning thereby the sole landlord or the entire body of landlords in respect of the holding. The question, it is said, has to be determined with reference to the provisions of the Public Demands Recovery Act which is a self-contained Act and in interpreting its sections the Court should not be influenced in any way by what is contained in the Bengal Tenancy Act.

The second point raised by Mr. Guha is that even if S. 20 (3), Public Demands Recovery Act, is confined to cases where the certificate-holder is the landlord in respect of the holding or the tenure, the Collector or the

receiver in the present case did occupy the position of a landlord with regard to the holding and the sale in execution of the rent certificate should therefore operate as a rent sale. The questions are of some importance and as they seem to be uncovered by any previous authority it is necessary that we should examine them carefully. Now, S. 20 (1), Public Demands Recovery Act, lays down the general proposition that what passes at the certificate sale is the right, title and interest of the certificate-debtor. The purchaser simply steps into the shoes of the certificate-debtor and takes the property subject to all liabilities created upon it by the debtor, prior to the attachment. Upon this general proposition an exception has been engrafted by sub-s. (3) which runs as follows :

"Notwithstanding anything contained in sub-s. (1) in areas in which Chap. 14, Ben. Ten. Act, 1885, is in force, where a tenure or holding is sold in execution of a certificate for arrears of rent due in respect thereof, the tenure or holding shall, subject to the provisions of S. 22 of that Act, pass to the purchaser, subject to the interest defined in that chapter as 'protected interests,' but with power to annul the interests defined in that chapter as 'incumbrances'."

Then follow certain provisos which indicate the way in which the different kinds of incumbrances are to be annulled. Sub-section (4) then lays down that where the certificate holder is a cosharer landlord and the certificate is for his share of the rent only, the provisions of sub-s. (3) shall not apply. Mr. Guha's argument is that the only thing necessary to attract the operation of sub-s. (3) is that the tenure or holding should be sold in execution of a certificate for arrears of rent due in respect thereof. The sub-section does not say that the certificate-creditor should be the landlord and, as in this case admittedly, the holding was put up to sale in execution of a rent certificate the provisions of sub-s. (3) of S. 20, Public Demands Recovery Act, should apply. The contention, though plausible at first sight, does not appear to us to be sound. In the first place, sub-s. (3) is made applicable only in areas where Chapter 14, Ben. Ten. Act, is in force. The entire procedure laid down in Chap. 14, Ben. Ten. Act, for sale of a tenure or holding in execution of a decree for arrears of rent is available only to the landlord who has a right of bringing the tenure or holding to sale under S. 65, Ben. Ten. Act. In our opinion, the reference to Chap. 14, Ben. Ten. Act, would be quite unmeaning if the intention of the Legislature was that a certificate-holder who was not the landlord at the date when the certificate was filed or put into execution would have the right to bring the tenure or holding to sale. This in our opinion is made clear by sub-s. (4) mentioned above which expressly

provides that sub-s. (3) would not apply when the certificate-holder is a cosharer landlord. This obviously implies that the certificate must be obtained either by the sole landlord or by the entire body of landlords. Mr. Guha contends that sub-s. (4) would be applicable only when the certificate was obtained by the landlord but in case the certificate-holder was not a landlord the provision of this section would have no application. This, in our opinion, would be putting an improper and, if we may say so, an unnatural interpretation upon the plain words of the section.

It would be pertinent to point out that sub-s. (3) of S. 20 as it stands at present in the Public Demands Recovery Act of 1913, did not find a place in the old Act of 1895. It was introduced for the first time in 1913. Sections 60 to 64 of the same Act modified the entire Chap. 13A, Ben. Ten. Act, as it stood under the amending Acts of 1907-1908 and one uniform procedure was laid down in both the Acts with regard to the recovery of rent in a summary manner by certain landlords to whom the privilege of certificate procedure was given. Section 61 of the Act was in the same terms as S. 158 (b), Ben. Ten. Act, and it provided inter alia that when a tenure or holding was sold in execution of a certificate under the Public Demands Recovery Act the tenure or holding would pass to the purchaser if such certificate was filed on the requisition of or in favour of the sole landlord or the entire body of landlords. This section was repealed by Act 4 of 1928, but the provision relating to certificate for arrears of rent was transferred to S. 158AAA. All these provisions relating to summary realisation of rent by the privileged landlords either under Ss. 60 to 64 or under Chap. 13A, Ben. Ten. Act, have now been repealed by Act 6 of 1938. It can, we think, be argued with perfect propriety that when sub-s. (3) was added to S. 20 in the Public Demands Recovery Act of 1913, the Legislature was not unmindful of the provisions contained in Ss. 60 to 64 of the Act, and its object was to make a general provision according to which not merely the right, title and interest of the judgment-debtor but the holding or tenure itself would pass to the purchaser at a certificate sale provided the certificate was for arrears of rent and had all the essentials of a rent decree proper under Chap. 14, Ben. Ten. Act. It is true that Ss. 60 to 64 are no longer in the Act but S. 20 (3) which is worded in a general manner has still its utility at the present time and in fact is availed of in cases where rent certificates are obtained either against khas mahal tenants or at the instance of the Court of Wards or Revenue authorities who are in charge or

management of other peoples' estates. Quite apart from these considerations, we are definitely of opinion that the language of S. 20 taken as a whole indicates unmistakably what the intention of the Legislature was and it is not susceptible of the interpretation sought to be put upon it by the learned advocate for the appellant. The first contention of Mr. Guha therefore cannot be accepted.

Mr. Guha argues in the second place that in the case before us the Collector or rather the receiver appointed by him might be said to occupy the position of the landlord with regard to the holding which was sold in execution of the certificate for arrears of rent and as the provisions of S. 20 (3) have been complied with, the holding itself would vest in the plaintiff. Now, under S. 99, Bengal Cess Act, it is open to the Collector under the circumstances specified in the section to cause a notification to be issued in the form prescribed in Sch. (F) in respect of any estate or tenure from which any arrears are due to the Collector under the provisions of the Cess Act. The notification has to be published in a certain way prescribed in the section and after the publication every payment of rent save and except to the Collector or some person by him thereunto appointed shall be null and void; the section then provides that the Collector may recover by any process of law for the time being in force by which he might recover rent due to the Government from a tenanted estate which is managed directly by the Collector, the rent then or thereafter to become due from any occupier, tenure-holder, under-tenant or raiyat on the estate or tenure in respect of which the notification has been issued until the amount due to the Collector together with all costs shall be satisfied, whereupon the said notification shall be revoked. Thus the effect of the attachment is that it imposes a prohibition on all classes of tenants down to the actual cultivator or occupier of the soil to pay rent to anybody other than the Collector so long as the estate remains under attachment; and the Collector is empowered to collect rents from all the different classes of tenants so long as the arrears of cess are not satisfied. The term 'landlord' as defined in the Bengal Tenancy Act means a person immediately under whom a tenant holds and the term 'tenant' is defined to mean a person who holds land under another person and is or but for a special contract would be liable to pay rent for that land to that person. It cannot be suggested that all the different grades of tenants are to be deemed in law to hold their respective interests under the Collector as landlord, for in that case in respect of

each one of these interests the Collector would be both the landlord and the tenant at one and the same time and the results would be altogether anomalous.

Mr. Guha who had argued the case with great thoroughness has laid stress on certain decisions of this Court, *vide* 18 C. W. N. 1016;¹ 15 C. L. J. 339² and 46 C. W. N. 893,³ for the purpose of showing that a usufructuary mortgagee of the landlord's interest, a receiver appointed by Court and also a person to whom on payment of land revenue possession of a property in suit has been given under O. 39, R. 9, Civil P. C., have been held to be landlords in respect of rent suits brought by them, under the provisions of the Bengal Tenancy Act. In our opinion the position of a Collector exercising powers under S. 99, Bengal Cess Act is quite different from that of the other persons mentioned above. As a result of the attachment the Collector does not become the assignee of any interest in the estate or tenure as in the case of a usufructuary mortgagee nor is he put in possession of any particular estate or interest as in the case of a receiver appointed by Court or of a person who is given possession under O. 39, R. 9, Civil P. C. The property does not pass under the charge or management of the Collector by virtue of the attachment. He does not represent the proprietary interest or in fact any other kind of interest and all that he can do is to exercise the statutory powers of realising rents from any person who holds lands in any capacity within the estate or tenure, no matter to whomever the rent might be payable. The different classes of landlords or rent receivers still retain their status and it has been held by a Division Bench of this Court, *vide* 45 C. W. N. 44,⁴ that they can file suits for recovery of rents against tenants though no decree can be passed in their favour so long as the attachment subsists. In our opinion, therefore, neither the Collector nor the receiver appointed by him can be said to be the landlord with regard to the holding which was sold in execution of the certificate for rent and consequently the provisions of S. 20 (3), Public Demands Recovery Act are not attracted to the facts of this case. The result is that we affirm the decision of the lower appellate Court and dismiss the appeal with costs.

Akram J. — I agree.

G.N.

Appeal dismissed.

1. (14) 1 A. I. R. 1914 Cal. 910 : 18 C. W. N. 1016, *Brahmananda Nath v. Hem Chandra*.
2. (12) 15 C. L. J. 339, *Bhubaneswari Koar v. Ajodya Singh*.
3. (42) 46 C. W. N. 893, *Pashupati Nath Pal v. Durjodhan*.
4. (41) 28 A. I. R. 1941 Cal. 353 : 45 C. W. N. 44, *Manindra Chandra Roy v. Gopi Ballav*.

Acc. No. 177262...
 Dated 2.4.11.80...
 END

A. I. R. (31) 1944 Calcutta 448

HENDERSON J.

Emperor

v.

Chuni Lal De and another — Accused.

Criminal Ref. Case No. 77 of 1943, Decided on 25th June 1943.

Penal Code (1860), S. 198 — Injuries slight — Certificate by doctor false — Complainant's or his pleader's prosecution under S. 198 is misconceived.

The severity of the injury is a matter of opinion and since the accused persons could not know that an opinion given by a doctor was false, their prosecution under S. 198 is clearly misconceived. If the doctor has given a false opinion at their instigation that would be a conspiracy to fabricate false evidence which is quite a different offence. In the absence of anything on the record to that effect a prosecution on that ground cannot be justified. [P 448 C 2]

S. C. Talukdar, Nirmal Kumar Sen and Nanda Lal Roy — for Accused.

Order. — This is a reference by the Sessions Judge of Dacca recommending that certain proceedings pending against the petitioner and another person under section 198, Penal Code, should be quashed. The other person referred to is the complainant in a certain case. The petitioner is his pleader. A certificate was produced given by a certain doctor to the effect that the injuries on the complainant were severe. This certificate appeared to be so absurd that the Sub-divisional Magistrate had the complainant examined by another doctor who stated that the injuries in question were slight. The Sub-Divisional Magistrate is apparently of opinion that the practice of granting certificates of this kind is growing far too common and therefore directed the prosecution of the complainant and his pleader under S. 198, Penal Code, although the chief culprit if there be a culprit, was the doctor.

The severity of the injury is a matter of opinion. Apart from other difficulties pointed out by the learned Sessions Judge, it is difficult to see how the accused persons could know that an opinion given by a doctor was false. The prosecution under this section was clearly misconceived. It may be that the doctor thought that the injury was slight and gave a false opinion at the instigation of the complainant or the pleader. This would really be a conspiracy to fabricate false evidence which is quite a different offence. There is nothing on the record which would justify a prosecution on that ground. I accordingly accept the reference and direct that the proceedings pending against the accused persons be quashed.

R.K.

Reference accepted.

